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978-1-107-03608-6 - Preventing Regulatory Capture: Special Interest Influence and
How to Limit it

Edited by Daniel Carpenter and David A. Moss

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Preventing Regulatory Capture

Special Interest Influence and How to Limit It

Edited by

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Captured by Disaster? Reinterpreting Regulatory Behavior in the Shadow of the Gulf Oil Spill

Christopher Carrigan¹

As this volume aptly illustrates, regulatory capture – which Daniel Carpenter and David Moss describe in the Introduction as a condition whereby regulation is applied for the benefit of the regulated entities as opposed to the public interest – has occupied the fascination of researchers from a wide variety of academic fields for a long time.² However, in terms of salient examples, at first glance the plight of the Minerals Management Service (MMS), a defunct agency of the Department of the Interior (Interior) that employed roughly 1,600 federal workers,³ presents perhaps the clearest case of capture in recent history. Not only did behavior at the agency provide rare public confirmation of the types of activities including bribery and excessive gift exchange that theorists have predicted do occur with captured regulatory relationships, drug use and sexual misconduct involving MMS employees and their industry counterparts revealed evidence of actions that extend beyond those that even captured agencies typically display. Support for MMS's failure was tangible given its association with the

¹ George Washington University, Trachtenberg School of Public Policy and Public Administration. I am grateful to Dan Carpenter, Cary Coglianese, Steve Kelman, and Dennis Yao as well as participants in the Tobin Project's November 2010 and April 2011 *Preventing Capture* conferences for helpful conversations regarding this chapter. I have also benefited from the research assistance of Ben Meltzer, Ellen Qualey, and Tim Von Dulm throughout.

² Samuel P. Huntington, "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest," *Yale Law Journal* 61 (4) (1952): 467–509; Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton: Princeton University Press, 1955); George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* 2 (1971): 3–21; Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics* 19 (2) (1976): 211–40; Michael E. Levine and Jennifer L. Forrence, "Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis," *Journal of Law, Economics, and Organization* 6 (1990): 167–98.

³ Minerals Management Service (MMS), "United States Department of the Interior Budget Justification, F.Y. 2011" (U.S. Department of the Interior, 2010).

April 2010 *Deepwater Horizon* oil rig fire and subsequent spill that deposited roughly 4.9 million barrels of oil into the Gulf of Mexico and had historians debating its place on the list of worst environmental disasters in U.S. history.⁴

With these facts in hand, it is not surprising that a large number of observers regarded capture as central to explaining the oil spill and MMS's role in facilitating it. For this reason, most attention focused on why MMS was captured and what should be done about it, relative to serious consideration of both the extent to which the agency was captured and how important this factor was in understanding why the spill might have occurred. Two popular theories surfaced to explain the apparent failure of MMS, one emphasizing the role of the agency's outwardly conflicting missions and the other focusing on the collaborative stance adopted by the agency toward its regulated industry. In fact, similar thinking contributed to Secretary of the Interior Ken Salazar's announcement on May 19, 2010, to disband the agency, only one month after the initial explosion on the BP-leased *Deepwater Horizon* drill ship. Citing conflicts of interest in fulfilling its functions to collect revenue, provide regulatory oversight, and facilitate energy development, the Secretary outlined a plan to disseminate MMS's functions among three discrete organizations within Interior.⁵

Still, closer examination of the organizational and political development of MMS raises questions that force us to be precise about how the mechanisms commonly cited contributed to the oil and gas industry's capture of MMS. In contrast to initial impressions, a review of the historical evidence indicates that the importance of capture to explaining the Gulf oil spill may be overstated. More careful study likewise suggests that inquiry into the degree to which MMS was in fact captured is worthwhile. This does not suggest that one should discount the obvious evidence of inappropriate and unethical activity by some MMS employees. Such behavior is clearly wrong and, if it promotes agency actions that favor the regulated industry, can be associated with capture.

However, inspection of MMS's development reveals the need to be careful in focusing only on the set of newsworthy events to characterize the behavior of the entire organization, both at the time the events occurred and historically. Furthermore, as the analysis in this case demonstrates, overemphasizing capture and the vague connotations traditionally associated with

⁴ David A. Fahrenthold and Ylan Q. Mui, "Historians Debate Designation of 'Worst Environmental Disaster' in U.S.," *Washington Post* (June 22, 2010): A6; United States Geological Survey, "Deepwater Horizon MC252 Gulf Incident Oil Budget, Government Estimates – Through August 01 (Day 104)," 2010, <http://www.usgs.gov/foia/budget/08-02-2010...Deepwater%20Horizon%20Oil%20Budget.pdf>.

⁵ Department of the Interior, "Reorganization of the Minerals Management Service" (Implementation Report, U.S. Department of the Interior, 2010).

the concept underscores the potential for such overarching claims to obscure plausible alternative explanations. Such a failure can lead to potentially misguided policy responses that do not correct existing problems. In addition, these solutions may not properly account for unintended side effects associated with their implementation – side effects that may explain why an agency like MMS was created so as to combine seemingly incompatible roles. In short, focusing on organizational characteristics such as MMS's conflicting functions and cooperative regulatory approach solely from the perspective of capture precludes the possibility that such characteristics may have cause and effect relationships quite unrelated to it. Although it may well explain some portion of what precipitated the Gulf oil spill, focusing solely on capture certainly does not reveal the whole story.

After first reviewing the evidence and arguments for MMS's capture, the remainder of the chapter focuses on analyzing the political and operational history of MMS. The discussion begins with MMS's creation in 1982 and follows its development through the beginning of 2010 before the disaster. Even so, the study is centered less on the progression of MMS over time and more on its evolution with regard to several broad themes. These include recognizing that MMS was (a) created in response to perceived failures among existing Interior agencies to adequately manage governmental oil and gas functions; (b) organized by separating its core missions, revenue collection and offshore energy management, into two independent units; (c) embroiled from its inception in revenue collection difficulties that were matched by curious agency funding decisions; (d) facing a broad shift in political and public policy preferences toward greater emphasis on energy production relative to environmental protection; and (e) operating in a radically changing offshore environment with emerging technologies. Collectively, these themes reveal that MMS's original organizational design had a purpose, that MMS's mixed mission may have played less of a role in its capture than originally thought, and that, even to the extent MMS was captured, this feature may not be of fundamental importance to understanding the historical progression of U.S. offshore oil and gas policy. Given that the goal of MMS's disbanding was to overcome its perceived organizational inadequacies, this analysis also raises questions about the wisdom of that choice.

THE BASIS FOR THE OIL AND GAS INDUSTRY'S CAPTURE OF MMS

The primary and most direct evidence for the oil and gas industry's capture of MMS is derived from two Department of the Interior Office of Inspector General (OIG) communications released in September 2008 and

May 2010, respectively.⁶ The first, summarizing the results of three separate investigations, focused primarily on the activities between 2002 and 2006 of members of the Royalty in Kind (RIK) Program within MMS's Minerals Revenue Management (Revenue Management) division. The RIK Program was an initiative designed to allow MMS to receive royalty revenue from industry by taking possession of a portion of the oil and gas produced rather than the monetary equivalent and subsequently selling that oil on the open market.⁷ The memorandum and associated investigative reports detail the extent to which nine of the nineteen implicated employees accepted industry gifts in the form of unreimbursed meals, parties, trips, and attendance at events such as golf tournaments. Although OIG noted that no gifts were individually large, these individuals received gifts frequently and often did not report them internally.⁸ Furthermore, two of the cited employees admitted to "brief sexual relationships" with industry contacts and confided that industry events often included alcohol consumption.⁹ OIG also uncovered evidence of drug abuse by some members of the group as well as outside employment that was not reported on internal disclosure forms. In one case, the individual appears to have deliberately withheld his involvement in a firm that consulted to oil and gas companies interacting with the RIK Program.¹⁰ Finally, although not necessarily evidence of capture but still unethical, one report describes how three senior officials in the Revenue Management division "remained calculatedly ignorant of the rules governing post-employment restrictions, conflicts of interest and Federal Acquisition Regulations" in awarding two consulting contracts to two of these employees after they retired from MMS.¹¹

The other memorandum from May 2010 summarized the results of an investigation of the Lake Charles, Louisiana, district office, one of five offices

⁶ Earl E. Devaney, "OIG Investigations of MMS Employees" (Memorandum, Office of the Inspector General, U.S. Department of the Interior, 2008); Mary L. Kendall, "Investigative Report – Island Operating Company, et al." (Memorandum, Office of the Inspector General, U.S. Department of the Interior, 2010).

⁷ Devaney, "OIG Investigations of MMS Employees"; Office of the Inspector General, "Investigative Report: MMS Oil Marketing Group – Lakewood" (Office of the Inspector General, U.S. Department of the Interior, 2008), 2.

⁸ Devaney, "OIG Investigations of MMS Employees," 2; Office of the Inspector General, "Investigative Report: MMS Oil Marketing Group," 5.

⁹ Office of the Inspector General, "Investigative Report: MMS Oil Marketing Group," 8.

¹⁰ Office of the Inspector General, "Investigative Report: Gregory W. Smith" (Office of the Inspector General, U.S. Department of the Interior, 2008).

¹¹ Devaney, "OIG Investigations of MMS Employees," 2; Office of the Inspector General, "Investigative Report: Federal Business Solutions Contracts" (Office of the Inspector General, U.S. Department of the Interior, 2008).

charged with overseeing oil and gas operations in the Gulf of Mexico.¹² The communication and associated report described the extent to which MMS employees in the office accepted gifts from offshore operators. These gifts included lunches and admission to sporting events in addition to participation in activities with industry personnel such as golf outings, hunting and fishing trips, and skeet-shooting contests.¹³ When asked about the events, one employee noted, "Almost all of our inspectors have worked for oil companies out on these same platforms. They grew up in the same towns . . . Some of these people, they've been friends with all their life."¹⁴ Although the earliest reference to such activities was in 2000, they ceased in 2007 after MMS's regional director for the Gulf in New Orleans alleged that the regional supervisor had accepted fishing and hunting trips from an offshore drilling operator. These gifts prompted the supervisor to issue a letter supporting a \$90 million insurance claim by the company for a drilling rig that sunk during Hurricane Rita.¹⁵ In addition to accepting gifts, although OIG examined a number of reports and did not find evidence to support the allegation, a confidential source accused some MMS inspectors of allowing companies to fill out inspection forms.¹⁶ Finally, the report chronicled a series of e-mail exchanges between a former inspector and an employee of an offshore operator discussing his potential employment at the company. During this period, the inspector was responsible for overseeing operations of this firm, a conflict that appears to have affected the extent to which he was willing to cite the company for non-compliance.¹⁷

In addition to the OIG investigations, within weeks of the initial explosion and fire on *Deepwater Horizon*, allegations that agency scientists were not able to exert enough influence over some recent MMS decisions to lease offshore properties began to surface as well.¹⁸ Although similar accusations

¹² Kendall, "Investigative Report."

¹³ Kendall, "Investigative Report"; Office of the Inspector General, "Investigative Report: Island Operating Company et al." (Office of the Inspector General, U.S. Department of the Interior, 2010).

¹⁴ Office of the Inspector General, "Investigative Report: Island Operating Company et al.," 3.

¹⁵ Office of the Inspector General, "Investigative Report: Donald C. Howard" (Office of the Inspector General, U.S. Department of the Interior, 2010); Office of the Inspector General, "Investigative Report: Island Operating Company et al."

¹⁶ Office of the Inspector General, "Investigative Report: Island Operating Company et al.," 7.

¹⁷ *Ibid.*

¹⁸ Juliet Eilperin, "U.S. Oil Drilling Regulator Ignored Experts' Red Flags on Environmental Risks," *Washington Post* (May 25, 2010), <http://www.washingtonpost.com/wp-dyn/>

were levied at Interior more broadly, MMS was singled out in particular as an agency in which such decisions lacked adequate consideration of possible environmental impacts. As Deputy Interior Secretary Hayes indicated in an interview, “There are certainly historical issues there [at MMS] that we’re interested in addressing and reforming. I think we’re in the process of getting a cultural change in the scientific part of MMS. We’re making sure the science is not a means to an end, but an independent input to the process.”¹⁹ Furthermore, one news article reported that some current and former staff scientists, on condition of anonymity, contended that MMS managers “routinely” overruled them when their studies highlighted environmental risks.²⁰ As one scientist suggested, “You simply are not allowed to conclude that the drilling will have an impact.”²¹

Given the nature of these and the OIG findings, it is not surprising that many observers derided MMS as a clear case of a captured agency. Furthermore, these assertions originated from a broad set of commentators. Media outlets including the *New York Times* and *Washington Post* chronicled the exploits of MMS, citing its “partnership” and overly “cozy ties to industry” as important factors in explaining MMS’s inadequate performance of its regulatory duties.²² Referencing these stories, research institutions as ideologically varied as the Center for Progressive Reform and CATO, although offering substantially different remedies for the problem, nonetheless agreed that MMS presented a clear example of a captured agency.²³ Political opinions were similarly unified in their view of MMS. This is exemplified in President Barack Obama’s remark during his May 2010 press conference temporarily halting deep water drilling that “the oil industry’s cozy and

content/article/2010/05/24/AR2010052401974.html; Ian Urbina, “U.S. Said to Allow Drilling without Needed Permits,” *The New York Times* (May 13, 2010): A1.

¹⁹ Eilperin, “U.S. Oil Drilling Regulator Ignored Experts’ Red Flags.”

²⁰ Urbina, “U.S. Said to Allow Drilling without Needed Permits.”

²¹ *Ibid.*

²² Juliet Eilperin and Scott Higham, “How the Minerals Management Service’s Partnership with Industry Led to Failure,” *Washington Post* (August 24, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/24/AR2010082406754.html>; Ian Urbina, “Inspector General’s Inquiry Faults Regulators,” *The New York Times* (May 24, 2010), <http://www.nytimes.com/2010/05/25/us/25mms.html>.

²³ Cato Institute, *MMS ‘Captured’ by Industry* (Washington, D.C.: Cato Institute, 2010), <http://www.downsizinggovernment.org/mms-%E2%80%98captured%E2%80%99-in-dustry>; Alyson Flournoy, William Andreen, Rebecca Bratspies, Holly Doremus, Victor Flatt, Robert Glicksman, Joel Mintz, Daniel Rohlf, Amy Sinden, Rena Steinzor, Joseph Tomain, Sandra Zellmer, and James Goodwin, “Regulatory Blowout: How Regulatory Failures Made the BP Disaster Possible, And How the System Can Be Fixed to Avoid a Recurrence” (Center for Progressive Reform White Paper 1007, Center for Progressive Reform, 2010).

sometimes corrupt relationship with government regulators meant little or no regulation at all.”²⁴ In addition to the literally dozens of House and Senate hearings evaluating the role of MMS in the disaster, the OIG allegations even prompted the Senate Judiciary Committee to hold a hearing directly addressing capture, entitled “Protecting the Public Interest: Understanding the Threat of Agency Capture.”²⁵

The many commissions tasked to investigate the accident also often reached the same conclusion. When asked to comment on the Interior’s reorganization plan for the agency, a cochair of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (National Commission) responded that MMS was “overly susceptible to industry influence, certainly outgunned and possibly captured.”²⁶ Perhaps even more telling, during hearings conducted by the National Commission, former MMS Director Elizabeth Birnbaum described the “close connection” that existed between the agency’s inspectors and oil and gas industry employees.²⁷ Secretary Salazar echoed Birnbaum’s comments in reacting to the aforementioned OIG report on activities at the Lake Charles office, suggesting it was “further evidence of the cozy relationship between some elements of MMS and the oil and gas industry.”²⁸

Given the degree of consensus associated with the notion that the oil and gas industry captured MMS, commentators turned their attention to identifying why MMS was susceptible to capture. These investigations tended to focus on two aspects of MMS’s operations that contributed to its failure as a regulator. The first relates to MMS’s collaborative stance toward regulatory enforcement. Critics suggested that the fact that MMS engaged the industry to jointly develop standards for offshore operations positioned it as an industry partner rather than a regulator with its own independently

²⁴ Barack Obama, “Remarks by the President on the Gulf Oil Spill” (The White House, Office of the Press Secretary, 2010).

²⁵ Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, U.S. Senate, “Protecting the Public Interest: Understanding the Threat of Agency Capture” (Hearing, 111th Congress, 2010).

²⁶ Katherine M. Peters, “Reorganization of Minerals Management Service Raises Doubts,” *Government Executive.com*, 2010, <http://www.govexec.com/oversight/2010/09/reorganization-of-minerals-management-service-raises-doubts/32425/>.

²⁷ S.E. Birnbaum, “Statement of S. Elizabeth Birnbaum, Director, Minerals Management Service, Department of the Interior, before the Subcommittee on Energy and Environment, Committee on Energy and Commerce” (U.S. House of Representatives, 2010).

²⁸ Office of the Secretary of the Interior, “Salazar: IG Report on Abuses in MMS Is ‘Yet Another Reason to Clean House’” (Press Release, Office of the Secretary, U.S. Department of the Interior, 2010).

informed views.²⁹ This position is crystallized in Congressman Henry Waxman's reference to the limited role of President Obama's reforms in changing "the laissez-faire approach of MMS in regulating the BP well."³⁰ MMS's laissez-faire style was also a fundamental concern for those who bemoaned the fact that the agency left some of its standards voluntary, undercutting their effectiveness.³¹ For example, although it began discussions in 1991 with the oil and gas industry over the need for operators to have management systems in place to direct various operational activities, the resulting American Petroleum Institute Recommended Practice 75 was only made mandatory after the agency's breakup in 2010.³²

Many viewed such examples of MMS's collaborative approach to regulating as a precursor to its capture. At some point, this stance caused the agency to become captive to its regulated entities rather than their overseer. Although the direction of causation – whether collaboration caused capture or vice versa – is somewhat unclear, the implication remains that a more adversarial regulatory body would have limited the potential for a spill such as that associated with the *Deepwater Horizon* explosion.³³ At a 2011 talk at the International Offshore Oil and Gas Law Conference, Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) Director Michael Bromwich stressed the need for the successor to MMS to "strike a new balance that fully involves industry in the regulatory process but that recognizes the need . . . to exercise independent judgment."³⁴

²⁹ Eilperin and Higham, "How the Minerals Management Service's Partnership with Industry Led to Failure."

³⁰ Henry A. Waxman, "The Role of the Interior Department in the Deepwater Horizon Disaster," Statement of Rep. Henry A. Waxman, Chairman, Committee on Energy and Commerce (Subcommittee on Oversight and Investigations and the Subcommittee on Energy and Environment, U.S. House of Representatives, 2010).

³¹ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, "Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling," Report to the President (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, 2011), 71–72.

³² Walt Rosenbusch, "Meeting the Challenge at the Minerals Management Service," in *Fifty-Second Annual Institute on Oil and Gas Law and Taxation* (New York: Matthew Bender, 2001); Office of Public Affairs, "BOEMRE Director Makes Case for Regulatory Reform at Oil and Gas Law Conference" (Press Release, Bureau of Ocean Management, Regulation and Enforcement, Office of Public Affairs, 2010).

³³ Eilperin and Higham, "How the Minerals Management Service's Partnership with Industry Led to Failure"; K.A. Neill and J.C. Morris, "Examining Agency Capture through a Principal-Agent Lens: The Case of the Deepwater Horizon Oil Spill" (Working Paper, 2011).

³⁴ Office of Public Affairs, "BOEMRE Director Makes Case for Regulatory Reform."

The second explanation for MMS's capture centered on its charge to fulfill multiple and what were generally regarded as conflicting functions.³⁵ When it was created in 1982 by then Secretary of the Interior James Watt, MMS was tasked with the role of collecting and distributing the revenue generated through onshore and offshore leases of federal property to companies who used the lands to extract oil and natural gas for private sale.³⁶ However, Secretary Watt simultaneously entrusted the agency with overseeing the orderly development and regulation of offshore oil and gas production on the Outer Continental Shelf (OCS), which included the Atlantic and Pacific coasts as well as the waters of the Gulf and those surrounding Alaska.³⁷

Many commentators pointed to this design issue as one that laid the foundation for MMS's capture.³⁸ Specifically, by structuring the agency such that it was tasked to collect revenue – and given that revenue could not be collected without production – the decision to place both functions with MMS made it difficult for the agency to fulfill its role as regulator, as doing so effectively would limit offshore development and resulting production. Thus, in restricting MMS's ability from the outset to regulate effectively, the agency readily became captured by the industry, as the two were never really at cross-purposes anyway.³⁹ However, to make matters worse, the agency was also allowed to offset a substantial portion of its budget appropriations using the revenue it collected from oil and gas production on federal lands.⁴⁰ As a result, to the extent that it accomplished its mission as regulator, it limited its own budget. However, conflict was not only present between the offshore management and revenue collection groups. It could also be identified within the management group as well. Divided into leasing and offshore operations, the first would oversee development and the second regulation. In the same way that revenue collection stymied regulation,

³⁵ Nicholas Bagley, "Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, U.S. Senate, Protecting the Public Interest: Understanding the Threat of Agency Capture" (Submission for the Record, Hearing, 111th Congress, 2010), 38–45.

³⁶ Robert F. Durant, *The Administrative Presidency Revisited: Public Lands, the BLM, and the Reagan Revolution* (Albany, NY: State University of New York Press, 1992).

³⁷ Durant, *The Administrative Presidency Revisited*.

³⁸ Flournoy et al., "Regulatory Blowout"; Robert Forbis, Jr., "Sex, Drugs, and Oil and Gas: An Analysis of How the Energy Industry Captured the Minerals Management Service" (Working Paper, 2011); Peter J. Honigsberg, "Conflict of Interest that Led to the Gulf Oil Disaster" (Working Paper, 2011).

³⁹ Honigsberg, "Conflict of Interest."

⁴⁰ Flournoy et al., "Regulatory Blowout."

having MMS manage offshore development further weakened its impetus to engage in effective regulation of offshore oil and gas activities.

In addition to its theoretical relevance, this view of MMS propelled important reforms as well. As described, it prompted Secretary Salazar's Order 3299, which separated the components of MMS into three agencies, one focused only on collecting revenue, another on offshore management, and the third on safety and environmental protection.⁴¹ Accompanying the change, Salazar noted that MMS "has three distinct and conflicting missions that – for the benefit of effective enforcement, energy development, and revenue collection – must be divided."⁴² Even so, some did not regard such reforms as enough, advocating more radical reorganizations, including moving revenue collection to a separate department and dividing the tasks of MMS even more finely to create additional independent bureaucratic units.⁴³

DEPARTMENT OF THE INTERIOR DEFICIENCIES AND MMS'S ORGANIZATIONAL DEVELOPMENT

Having described the foundation for and evidence supporting its disbanding in 2010, the discussion now shifts to an examination of MMS's creation in 1982 and subsequent organizational, operational, and political development up to the point of that 2010 decision. MMS was formed primarily as a result of the recommendations of the Commission on Fiscal Accountability of the Nation's Energy Resources, otherwise known as the Linowes Commission.⁴⁴ The Commission was an independent panel formed in 1981 to investigate the performance of the U.S. Geological Survey (USGS) as Interior minerals revenue collector. USGS, authorized by Congress in 1926 to supervise performance of leases and royalty collection, was repeatedly criticized beginning in the late 1950s by the Government Accountability Office (GAO) as well as OIG for its inability to perform these roles adequately.⁴⁵

⁴¹ Ken Salazar, "Establishment of the Bureau of Ocean Management, the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resources Revenue" (Order No. 3299, Secretary of the Interior, U.S. Department of the Interior).

⁴² Office of the Secretary of the Interior, "Salazar Divides MMS's Three Conflicting Missions" (Press Release, Office of the Secretary, U.S. Department of the Interior, 2010).

⁴³ Flournoy et al., "Regulatory Blowout."

⁴⁴ David F. Linowes, *Creating Public Policy: The Chairman's Memoirs of Four Presidential Commissions* (Westport, CT: Praeger, 1998); Henry B. Hogue, "Reorganization of the Minerals Management Service in the Aftermath of the Deepwater Horizon Oil Spill" (CRS Report for Congress 7-5700, Congressional Research Service, 2010).

⁴⁵ Commission on Fiscal Accountability of the Nation's Energy Resources, *Fiscal Accountability of the Nation's Energy Resources* (Washington, D.C.: Commission on Fiscal

At the core of the problem was the structure of the revenue management function within USGS, which was decentralized in its eleven regional offices. According to the Commission, USGS's failure, including its chronic inadequate collection of royalties as well as its inability to prevent oil companies from physically taking oil from oil fields without reporting it for tax purposes, was costing the federal government several hundred million dollars per year in lost revenue. In particular, the scientific focus of USGS was just not consistent with its mission to collect revenue and supervise leasing operations. Specifically, among its sixty recommendations, the Commission called for the creation of an independent agency focused on royalty collection and lease management and staffed with financial professionals to develop a centralized accounting system.⁴⁶

This call was reinforced by the Federal Oil and Gas Royalty Management Act (FOGRMA), enacted in January 1983 as a result of a bill introduced by Representative Edward Markey of Massachusetts in December 1981.⁴⁷ In it, Congress reiterated the need for the Secretary of the Interior to "establish a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties, interest, fines, penalties, fees, deposits, and other payments owed and account for such amounts in a timely manner."⁴⁸ Furthermore, FOGRMA required yearly inspections of those leases producing "significant quantities of oil or gas in any year" or having "a history of noncompliance."⁴⁹

Against this troubled backdrop, Secretary Watt established MMS in January 1982 through the first of a series of Secretarial Orders and Amendments during 1982 and the beginning of 1983, moving royalty collection from the Conservation Division of USGS to the new organization.⁵⁰ Later in 1982, the secretary further transitioned all offshore preleasing and lease management responsibilities to MMS from the Bureau of Land Management (BLM) and USGS, respectively, which, at the time, had split these duties.⁵¹ Through

Accountability of the Nation's Energy Resources, 1982); Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1996" (U.S. Department of the Interior, 1995).

⁴⁶ Commission on Fiscal Accountability of the Nation's Energy Resources, *Fiscal Accountability*.

⁴⁷ Congressional Research Service, "Bill Summary and Status" (CRS Summary, H.R. 5121, 97th Congress, 1982).

⁴⁸ Federal Oil and Gas Royalty Management Act of 1982, Pub. L. No. 97-451, §101 (1983).

⁴⁹ Federal Oil and Gas Royalty Management Act of 1982, §101.

⁵⁰ Department of the Interior, *Departmental Manual* (Washington, D.C.: Minerals Management Service, 2008).

⁵¹ Department of the Interior, *Departmental Manual*; Hogue, "Reorganization of the Minerals Management Service in the Aftermath of the Deepwater Horizon Oil Spill."

his final Order and Amendment, Secretary Watt shifted onshore management to BLM.⁵² The end result was that BLM assumed the duties associated with onshore development, leasing, and regulation, whereas MMS became responsible for the same components for offshore energy as well as revenue collection for both onshore and offshore leases.⁵³

Although not directly referenced in the Linowes Commission report, consolidation of offshore functions at MMS was actually in the spirit of what the Commission had been seeking.⁵⁴ In addition, GAO, which had also been investigating the performance of the minerals management program, went even further in its recommendations. In a statement before the Interior Subcommittee of the House Appropriations Committee after the initial Secretarial Order, the Special Assistant to the Comptroller General stated:

As we understand it, the responsibilities of the Minerals Management Service may eventually go beyond accounting and collecting of oil and gas royalties, and may address the entire mineral management area. We have previously recommended that Interior evaluate the need to consolidate mineral management responsibilities. Establishment of the Minerals Management Service is consistent with this recommendation.⁵⁵

The fact that BLM had managed offshore pre-lease activities as well as initial sales whereas USGS had maintained authority over lease management and revenue collection had created jurisdictional disputes and delays. These issues resulted in application backlogs and facilitated the oil thefts discussed in the Linowes Commission report. Thus it is not surprising that the House Appropriations Committee supported the MMS reorganization, indicating in its report:

The reorganization was the result of the underreporting of oil and gas production from Federal and Indian lands, theft of oil from those lands, and underpayment and inadequate collection of royalties owed to the United States . . . The bulk of the appropriation . . . is associated with the . . . evaluation of resources, regulations, and activities associated with Federal and Indian lands. These are functions formerly divided between the Geological Survey and the Bureau of Land Management. That

⁵² Department of the Interior, *Departmental Manual*.

⁵³ Durant, *The Administrative Presidency Revisited*.

⁵⁴ *Ibid.*

⁵⁵ Milton J. Socolar, "Statement of Milton J. Socolar, Special Assistant to the Comptroller General, before the Chairman, Subcommittee on Interior of the House Committee on Appropriations on the Report of the Commission on Fiscal Accountability of the Nation's Energy Resources" (U.S. House of Representatives, 1982), 6.

division of function often caused problems of neglect, duplication, and turf wars. The Committee agrees with the consolidation.⁵⁶

Aside from centralizing some of the agency's general administrative functions, to implement its dual charge to collect revenue and manage offshore development, MMS was organized specifically around these two functions from the beginning.⁵⁷ Under the broad activity Royalty Management, later renamed Minerals Revenue Management (Revenue Management), MMS housed its Royalty Collections, Royalty Compliance, and Systems Development subactivities.⁵⁸ These functions were collectively charged with implementing FOGRMA, which had attempted to set a course for improved oil and gas revenue collection. Although it maintained field offices in Dallas, Houston, and Tulsa to conduct agency audits, the bulk of Revenue Management's operations were centralized in its Lakewood office located outside of Denver in an effort to "provide efficiency and economies of scale in the financial and data collection process and to ensure consistent guidance to lessees and operators."⁵⁹

The second function, labeled Outer Continental Shelf Lands and later renamed Offshore Energy and Minerals Management (Offshore Energy), included MMS's Resource Evaluation, Leasing and Environmental, and Regulatory programs.⁶⁰ Although each had a different responsibility in the sequential process of preparing offshore properties for oil and gas exploration and development, these three subactivities were held tightly together by their respective roles in carrying out the Outer Continental Shelf Lands Act of 1953 (OCSLA). The Act established federal jurisdiction over submerged lands and set out basic procedures for leasing these lands.⁶¹ Moreover, the Act described the need to balance the objectives of development to support national economic and energy policy goals while providing for the protection of human, marine, and coastal environments. As a result of their joint charge to carry out the OCSLA, groups within Offshore Energy

⁵⁶ Committee on Appropriations, "Department of the Interior and Related Agencies Appropriation Bill, 1983" (House Report 97-942, U.S. House of Representatives, 1982), 40.

⁵⁷ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1985" (U.S. Department of the Interior, 1984); W. Bonora and T. Gallagher, "Retrospective: MMS in the 1990s," *MMS Today* Winter (2001): 1-4, 9, 13.

⁵⁸ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1985."

⁵⁹ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1994" (U.S. Department of the Interior, 1993), 108.

⁶⁰ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1985."

⁶¹ Outer Continental Shelf Lands Act, 1953, 43 U.S.C. 1331, et seq.

operated with a substantial degree of overlap, where, for example, an environmental study could support evaluation, leasing, and regulatory decisions simultaneously. Furthermore, although resource evaluation–related activities were most closely associated with planning efforts to identify areas for oil and gas development, the program was also “involved in all phases of OCS program activities,” even assisting “regulatory personnel to ensure that discoveries [were] developed and produced in accordance with the goals and priorities of the OCSLA.”⁶²

To the extent that federal offshore lands included the Atlantic and Pacific coasts as well as Alaska and the Gulf of Mexico, Offshore Energy maintained offices in all locations. Even so, in addition to housing a number of administrative personnel in Herndon, Virginia, most of the core Offshore Energy staff were situated in either the New Orleans office or one of the other district offices situated along the Gulf. This concentration of staff was further intensified by the decision to close the Atlantic office following President George H. W. Bush’s 1990 declaration of a moratorium on drilling in the region after the Exxon Valdez oil spill.⁶³

In many ways, MMS’s organizational design represented a complete reversal of what had preceded and failed before it. Rather than maintain separation between evaluation and leasing decisions and ongoing operations, as was the case when BLM and USGS split these functions, at MMS, these were joined together into one broad group. In addition, although USGS located royalty collection and leasing oversight in the same office for each region, MMS maintained a firm division between the two. Moreover, the separation between the Revenue Management and Offshore Energy groups was not something that simply characterized MMS’s initial creation. As Table 10.1 suggests, a strong correlation between geographical location and function still characterized MMS in 2008, two years before its breakup. Even using broad employment categories, science and engineering functions – associated specifically with Offshore Energy – were predominantly carried out by employees located in Louisiana. However, accounting and business roles remained centrally focused with Revenue Management in Colorado. These figures present a stark contrast to general administration and technology, which, as would be expected, was needed in both locations.

In addition to pointing out the geographical separation of the two groups, Table 10.1 further highlights how different the core functions associated

⁶² Minerals Management Service, “United States Department of the Interior Budget Justification, F.Y. 2005” (U.S. Department of the Interior, 2004), 108.

⁶³ Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 1996.”

Table 10.1. *Percentage of MMS employees by category in Colorado and Louisiana in September 2008*

Employment category	Colorado	Louisiana
Biological, physical, and social sciences	4.0%	62.5%
Engineering and investigation	4.9%	69.3%
Accounting and budget	56.3%	0.4%
Business and industry	73.5%	3.7%
Administration and technology	18.6%	31.9%
Total	27.4%	33.8%

Notes: Percentages do not sum horizontally to 100 percent because MMS maintained offices in other locations as well, most notably Virginia and Washington, D.C. Each figure reflects the percentage of total MMS employees in that employment category who were stationed in Colorado or Louisiana in September 2008.
Source: Office of Personnel Management’s FedScope data.

with the two entities within MMS were. In fact, the fundamental reason that the Linowes Commission recommended the removal of the royalty function from USGS was that the “scientifically oriented” agency was never “able to supply the active sophisticated management that [was] needed.”⁶⁴ In implementing the recommendation that properly collecting royalties required “top quality financial managers,”⁶⁵ Revenue Management built its group by hiring candidates with accounting and audit experience. However, Offshore Energy employed individuals with science backgrounds such as oceanographers and biologists in addition to engineers and those with experience on oil and gas platforms to fill its inspector roles. Even a cursory review of 2010 job openings confirms the extent to which the functions of the two programs differed. As one might expect, whereas auditing and accounting positions in Lakewood required significant prior experience in accounting and a CPA or Certified Internal Auditor certificate, undergraduate and graduate degree requirements for those applying for positions on the OCS specified chemistry, engineering, biology, geology, and related fields.⁶⁶

⁶⁴ Commission on Fiscal Accountability of the Nation’s Energy Resources, *Fiscal Accountability*, xvi.
⁶⁵ Socolar, Milton J., and United States. General Accounting Office, *Inspector General Act Amendments of 1988: Statement of Milton J. Socolar, Special Assistant to the Comptroller General, Before the Subcommittee On Legislation and National Security of the House Committee On Government Operations* [Washington, D.C.]: U.S. General Accounting Office, 1988.
⁶⁶ Bureau of Ocean Energy Management, Regulation and Enforcement, “Biologist: Job Advertisement,” U.S. Department of the Interior, 2011, USAJobs.com; Bureau of Ocean Energy Management, Regulation and Enforcement, “Inspector (Offshore Operations & Safety): Job Advertisement,” U.S. Department of the Interior, 2011, USAJobs.com; Bureau of

Given the vast differences between the two groups' operations personnel with respect to functions and backgrounds as well as their geographical dispersion, it is not surprising that they had difficulty coordinating their activities to the extent required. A December 2007 report of the Subcommittee on Royalty Management, a committee appointed by the Secretary of the Interior to study minerals revenue collection following an OIG investigation of the audit and compliance program, suggests the difficulties MMS had in this regard.⁶⁷ In prospectively recommending improvements to increase the efficacy of minerals collections, the Subcommittee noted the particular complications associated with having three bureaus involved in onshore minerals revenue collection. As both the Bureau of Indian Affairs (BIA) and BLM were responsible for relaying data on onshore production to the Revenue Management group, the Subcommittee was able to identify numerous instances in which the information was either incomplete or incorrect, resulting in excess costs, delays, and errors. However, beyond emphasizing the need to improve coordination among the three agencies, the subcommittee also noted that procedures needed to be established for "intra-Bureau coordination" as well.⁶⁸ In examining the systems used for sharing information between BLM and Revenue Management, the report documented that manual and paper-based transmissions between the two bureaus were "a major impediment to efficient royalty collection operations."⁶⁹ Somewhat surprisingly, the Subcommittee also described how the transmission of data between the Offshore Energy and Revenue Management functions encountered similar problems, as computer systems were not completely linked within MMS. The report went on to conclude, "Increased sharing of electronic information between BLM and MRM [Revenue Management], as well as between OMM [Offshore Energy] and MRM, would dramatically increase the consistency of Federal lease status and production information across these agencies."⁷⁰

Ocean Energy Management, Regulation and Enforcement, "Oceanographer: Job Advertisement," U.S. Department of the Interior, 2011, USAJobs.com; Bureau of Ocean Energy Management, Regulation and Enforcement, "Petroleum Engineer: Job Advertisement," U.S. Department of the Interior, 2011, USAJobs.com; Office of the Secretary of the Interior, "Accountant: Job Advertisement," U.S. Department of the Interior, 2011, USAJobs.com; Office of the Secretary of the Interior, "Auditor: Job Advertisement," U.S. Department of the Interior, 2011, USAJobs.com.

⁶⁷ Subcommittee on Royalty Management, U.S. Department of the Interior, "Report to the Royalty Policy Committee: Mineral Revenue Collection from Federal and Indian Lands and the Outer Continental Shelf" (Office of Policy Analysis, U.S. Department of the Interior, 2007).

⁶⁸ *Ibid.*, 83, 86.

⁶⁹ *Ibid.*, 21, 26.

⁷⁰ *Ibid.*, 27.

A September 2008 GAO report further documented some of the difficulties MMS was having internally coordinating efforts with respect to certain aspects of its royalty collection processes.⁷¹ For example, when discrepancies between company-reported oil and gas volumes and BLM or Offshore Energy measurements were uncovered, the affected companies would often need to submit corrected production statements. However, after receiving the updated information, those in Offshore Energy did “not relay this information to the royalty reporting section [Revenue Management] so that staff [could] check that the appropriate royalties were paid.”⁷² As a result, only through a reconciliation process several years later or in the case that an affected lease was selected for audit would Revenue Management be able to verify that the royalty payment was, in fact, correct or incorrect.⁷³ To mitigate these coordination problems, GAO suggested that it was “making several recommendations aimed at improving [MMS’s] royalty IT system and royalty collection and verification processes.”⁷⁴

THE CREATION OF MMS AS BACKGROUND FOR ASSESSING ITS CAPTURE

Even so, the extent to which Offshore Energy and Revenue Management operated independently might be best revealed in their separation through Secretary Salazar’s aforementioned Order 3299. A report submitted by Salazar to Congress on July 14, 2010, two months after the announcement, described both the rationale for as well as the plan to implement the secretary’s decision to divide MMS into three organizations.⁷⁵ In planning for the transitions, the document highlighted the division between Offshore Energy and Revenue Management, noting that the “Office of Natural Resources Revenue can be transitioned most quickly and will begin operations on October 1, 2010, with the transfer of the largely intact Minerals Revenue Management function.”⁷⁶

However, the report explained that the “creation of the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement will be more complex. The two Bureaus will be created from a single bureau in which functions and process are tightly interconnected, making

⁷¹ Government Accountability Office, “Mineral Revenues: Data Management Problems and Reliance on Self-Reported Data for Compliance Efforts Put MMS Royalty Collections at Risk” (GAO-08-893R, Government Accountability Office, 2008).

⁷² Government Accountability Office, “Mineral Revenues,” 5.

⁷³ *Ibid.*, 10–11.

⁷⁴ *Ibid.*, 5.

⁷⁵ Department of the Interior, “Reorganization of the Minerals Management Service.”

⁷⁶ *Ibid.*, 4.

the separation complicated and demanding.”⁷⁷ The document called for six months of planning, followed by a phased implementation that only resulted in the actual separation of the two functions in October 2011, almost a year and a half after the plan was first introduced. Even then, it was recognized that the two organizations would need to work closely to “maintain a functioning and effective process.”⁷⁸ In this way, the extent to which the evaluation, leasing, and regulatory functions, all housed in Offshore Energy, relied on each other presented a stark contrast to the independence maintained between Offshore Energy and Revenue Management.

In addition to further revealing the operational division between Offshore Energy and Revenue Management, the implementation plan has implications for evaluating the decision to reorganize as well. Given the impetus for the creation of MMS, the documented ease with which the Revenue Management function transitioned in contrast to the difficulties of dividing Offshore Energy is not surprising. MMS was created both because USGS’s integrated structure did not allow it to develop sufficient expertise in revenue collection and because the sharp division between USGS and BLM caused infighting and neglect of their joint charge to manage offshore oil and gas production. Of course, MMS’s organization was not without costs, as demonstrated by the December 2007 Subcommittee on Royalty Management and September 2008 GAO reports revealing that Revenue Management and Offshore Energy had difficulty harmonizing their activities.

Evaluating the order to divide MMS, which returned the offshore energy development functions to a structure that closely resembles the heavily criticized system prior to MMS’s creation, implies that the benefits of doing so must be weighed against the previously demonstrated failings of that structure. More formally dividing the revenue collection and offshore operations functions by creating separate bureaus can expose offshore royalty collection to the same difficulties already evident with onshore royalty collection—as displayed through the interactions of MMS, BLM, and BIA. These problems may thus exacerbate the less extensive coordination issues already evident within MMS. As the December 2007 report suggested, despite the problems within MMS, relative to onshore royalty management, “Coordination of activities associated with managing offshore oil and gas leases is more straightforward because only a single bureau [MMS] is involved.”⁷⁹ As a result, the Subcommittee as well as GAO recommended computer

⁷⁷ *Ibid.*, 6

⁷⁸ *Ibid.*, 11.

⁷⁹ Subcommittee on Royalty Management, “Report to the Royalty Policy Committee,” 82.

system enhancements and more formal organizational structures to facilitate improved intra- and interagency coordination.⁸⁰

Such a revelation also underscores the significance of carefully evaluating the extent to which the oil and gas industry captured MMS. In addition to the financial resources and employee dislocations that were necessary to implement the reorganization, the demonstrated problems in coordinating the activities of multiple bureaus accentuate the real importance that the benefits of increased independence, particularly in regulatory oversight. President Obama's announcement of the restructuring demonstrated the central role capture played in driving the reform. As suggested during his May 2010 press conference, following the first Inspector General report:

Secretary Salazar immediately took steps to clean up that corruption. But this oil spill has made clear that more reforms are needed. For years, there has been a scandalously close relationship between oil companies and the agency that regulates them. That's why we've decided to separate the people who permit the drilling from those who regulate and ensure the safety of the drilling.⁸¹

Given the costs, it seems that one should be reasonably confident of MMS's capture, that capture played an important role in the oil spill, and that the remedy will solve the problem. In the sections that follow, these issues are further examined.

CONGRESSIONAL OVERSIGHT AND MMS APPROPRIATIONS

The Department of the Interior's 1982 reorganization that created MMS appeared on the surface to temporarily divert political attention away from royalty management. In fact, Revenue Management was not the subject of a single oversight hearing independent of those associated with setting MMS's budget in 1983 and 1984. In contrast, Offshore Energy was the focus of at least twelve congressional hearings in which personnel from MMS appeared during that same two-year span. The issues associated with the hearings ranged from considering amendments to the Coastal Zone Management Act to ensure federal agencies acted in ways consistent with state coastal zone management plans, to the potential environmental impacts of possible offshore production in Georges Bank, located in the North Atlantic between Cape Cod and Nova Scotia.⁸² In addition, during this same period,

⁸⁰ *Ibid.*; Government Accountability Office, "Mineral Revenues."

⁸¹ Obama, "Remarks by the President on the Gulf Oil Spill."

⁸² Committee on Commerce, Science, and Transportation, U.S. Senate, "Coastal Zone Management" (Hearing, 98th Congress, 1984); Subcommittee on Oversight and Investigations of the Committee on Interior and Insular Affairs, U.S. House of Representatives, "Lease

the House Committee on Merchant Marine and Fisheries held a series of hearings on offshore regulatory issues which included a review of procedures for emergency evacuations as well as a discussion of safety and training requirements for offshore drilling rigs.⁸³

However, the apparent congressional focus on Offshore Energy veiled the investigations by GAO and OIG that were already in process at the time. By April 1985, when MMS appeared in the front of the House Committee on Government Operations, Revenue Management was already under intense scrutiny for its perceived inadequate performance in collecting royalties and disseminating them to states and Indian tribes.⁸⁴ In particular, a congressional inquiry had revealed numerous examples in which Revenue Management – which also maintained responsibility for collecting payments from oil and gas production on Indian lands and distributing those monies appropriately – either completely missed making payments to Indians or made them late and inaccurately. The evidence further revealed the extent to which MMS was unresponsive to BIA requests for individual account audits, a task that the Compliance group within Revenue Management was mandated to complete. In one case that later prompted affected Indians to camp outside of BIA's Anadarko, Oklahoma, office in protest, BIA had requested that Revenue Management perform reviews of eleven individual accounts based on landholder complaints. By the time of the hearing seventeen months later, only three reviews had been completed, revealing \$59,000 in additional monies owed to the individual Indian landowners.⁸⁵ The remaining eight reviews were only initiated after the congressional investigation impelled MMS officials to do so. In its written response to a question about the delay, Revenue Management admitted that it was “an obvious case of something ‘falling through the cracks.’ The Anadarko request was lost in our Lakewood office for almost a year.”⁸⁶

By this time, these and other collection and dissemination problems identified by GAO and OIG had already led to numerous reforms within Revenue

Sale No. 82: The Federal and State Relationship Concerning Georges Bank” (Hearing, 98th Congress, 1984).

⁸³ Subcommittee on Panama Canal/Outer Continental Shelf of the Committee on Merchant Marine and Fisheries, U.S. House of Representatives, “Offshore Safety” (Hearing, 98th Congress, 1983); Subcommittee on Panama Canal/Outer Continental Shelf of the Committee on Merchant Marine and Fisheries, U.S. House of Representatives, “Offshore Installations Emergency Evacuation” (Hearing, 98th Congress, 1984).

⁸⁴ Subcommittee of the Committee on Government Operations, U.S. House of Representatives, “Problems Associated with the Department of the Interior’s Distribution of Oil and Gas Royalty Payments to Indians” (Hearing, 99th Congress, 1985).

⁸⁵ *Ibid.*, 116.

⁸⁶ *Ibid.*, 117.

Table 10.2. *Subject matter of congressional hearings in which MMS personnel testified by function (1982–2009)*

Period	Evaluation	Leasing	Environment	Regulation	Revenue	Total
1982–1985	14	12	14	5	8	25
1986–1989	7	6	12	10	6	22
1990–1993	5	7	12	6	5	20
1994–1997	4	0	3	2	9	16
1998–2001	2	3	2	0	5	9
2002–2005	6	2	3	0	1	8
2006–2009	10	9	8	0	10	18

Notes: Does not include budget hearings. The sum of subject counts can exceed the total because hearings can involve multiple functions. Evaluation refers to identifying areas for oil and gas exploration whereas leasing refers to leasing properties to oil and gas producers. *Source:* Searches in LexisNexis Congressional database of congressional hearings. To categorize the subject matter of the hearings, each hearing’s title and summary description were examined. In some cases where clarification was required, the testimony was reviewed as well.

Management.⁸⁷ The changes included moving the head of the Revenue Management group from Washington, D.C., to Lakewood, further centralizing the revenue functions in that office. In addition, two committees were established in response – one would include Indian representation and advise the secretary of the Interior on revenue improvement initiatives, and another would be created to improve coordination between MMS, BIA, and BLM for onshore royalty collection and distribution. The investigations also identified the need to acquire a new mainframe computer system as well as install remote terminals to provide Indian tribes and states with greater data access.

However, these investigations would turn out to represent only the beginning of a series of congressional inquiries into the activities of Revenue Management over the next twenty-five years. Although the actual volume of hearings focused on revenue collection was not noticeably different from the corresponding numbers associated with oversight of Offshore Energy, the tone of the inquiries was. For example, as Table 10.2 reflects, many hearings held between 1986 and 1993 emphasized environmental and regulatory issues related to oil and gas operations on the OCS. Yet much of the attention was driven by the Exxon Valdez oil spill in March 1989 – an accident in which an oil tanker as opposed to a platform or drill ship deposited more than 250,000 barrels of oil into the waters off the southern coast of

⁸⁷ *Ibid.*, 84–85.

Alaska.⁸⁸ As a result, the Coast Guard and not MMS was the primary government agency with regulatory authority.⁸⁹ The Offshore Energy group did participate in the cleanup effort and received both regulatory authority to promulgate rules governing financial responsibility for oil spills as well as greater budgetary authority to conduct related research.⁹⁰ Even so, the hearings were not prompted by perceived faults in Offshore Energy's performance.

In contrast, in 1989, officials from Revenue Management again testified in front of Congress about additional allegations of deficiencies in the agency's efforts to collect royalties on behalf of Indian tribes and individuals.⁹¹ Furthermore, in the previous year, MMS officials had appeared before the Senate Committee on Energy and Natural Resources to discuss the findings of several OIG audits of revenue collections from 1986 through 1988. To open that hearing, Subcommittee Chairman John Melcher declared, "As a result of the Linowes Commission recommendations in 1982, Congress passed . . . the Federal Oil and Gas Management Act . . . Unfortunately, progress in implementing those recommendations has been slow. To date, action by the Department [of the Interior] falls far short of adequately carrying out the requirements of the law."⁹²

In addition to the individual hearings, even a cursory review of GAO reports over the period reveals the extent to which congressional criticism of MMS remained squarely focused on revenue collection relative to offshore energy management. During the four-year period from 1982 to 1985, royalties were the primary focus of three reports, offshore energy was the

⁸⁸ Samuel K. Skinner and William K. Reilly, "The Exxon Valdez Oil Spill" (The National Response Team, 1989).

⁸⁹ Skinner and Reilly, "The Exxon Valdez Oil Spill"; Subcommittee on Water, Power and Offshore Energy Resources of the Committee on Interior and Insular Affairs, U.S. House of Representatives, "Investigation of the Exxon Valdez Oil Spill, Prince William Sound, Alaska" (Hearing, 101st Congress, 1989).

⁹⁰ Committee on Energy and Natural Resources, U.S. Senate, "Gulf of Mexico Oil Spill Prevention and Response Act" (Hearing, 101st Congress, 1989); Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1991" (U.S. Department of the Interior, 1990), 36–37; Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1992" (U.S. Department of the Interior, 1991), 81–83; Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1993" (U.S. Department of the Interior, 1992), 91–92.

⁹¹ Special Committee on Investigations of the Select Committee on Indian Affairs, U.S. Senate, "Federal Government's Relationship with American Indians" (Hearing, 100th Congress, 1989).

⁹² Subcommittee on Mineral Resources Development and Production of the Committee on Energy and Natural Resources, U.S. Senate, "Royalty Management Program" (Hearing, 100th Congress, 1988), 1–2.

subject of nine, and one covered both. In contrast, over the next twenty-four years ending in 2009, in addition to eight reports that included a discussion of both groups, Revenue Management was GAO's main target in thirty-four reports relative to only seven for Offshore Energy, almost a five-to-one ratio. Furthermore, the titles of the reports confirm GAO's dissatisfaction with the agency's revenue collection efforts. Examples include a 1992 report that GAO titled "Royalty Compliance: Improvements Made in Interior's Audit Strategy, But More Are Needed," as well as a 2007 report with the heading "Royalties Collection: Ongoing Problems with Interior's Efforts to Ensure a Fair Return for Taxpayers Require Attention."

Similar to the first hearing on Indian royalties in 1985, subsequent investigations were often accompanied by reform efforts by Revenue Management, including reorganizations. From 1992 through 2000, the group underwent two major and at least three minor reorganizations. In particular, with congressional approval in October 1992, Revenue Management, which had been previously organized around the functions Collections, Compliance, and Systems, completed the first of these major restructurings by dividing these work units.⁹³ Collections were folded into Operations and Compliance; some portions of Compliance moved to Audit; and Systems was divided into parts that were moved into each of the new functions, Audit, Operations, and Compliance.⁹⁴ Even so, by the spring of 1994, these three units were reorganized into two: Valuation and Operations as well as Compliance.⁹⁵ In addition, around the same time, Revenue Management opened offices in Oklahoma and New Mexico to manage Indian royalty issues.⁹⁶ Later, with the 1996 Appropriations Bill, Congress directed Revenue Management to centralize administrative support functions such as budget reporting in its Program Services Office.⁹⁷ In the following fiscal year, Revenue Management again revised its structure, centralizing Valuation and Operations with Compliance under one deputy director while at the same time combining two subdivisions and renaming another.⁹⁸ Finally, effective October 2000, Congress approved another major restructuring, which created the Revenue

⁹³ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1994," 7.

⁹⁴ *Ibid.*, 108–109.

⁹⁵ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1996," 30.

⁹⁶ *Ibid.*, 7.

⁹⁷ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1997" (U.S. Department of the Interior, 1996), 32, 139.

⁹⁸ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1998" (U.S. Department of the Interior, 1997), 119.

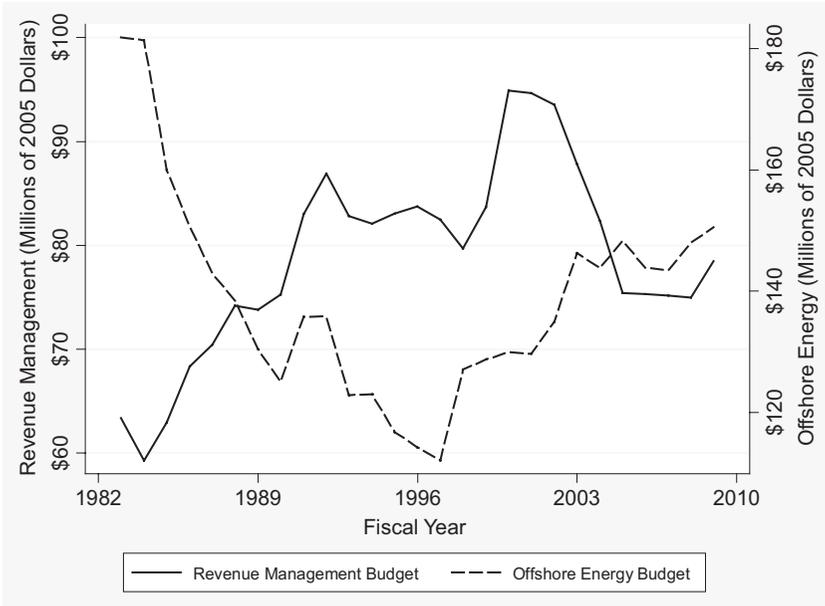


Figure 10.1. MMS's Offshore Energy and Revenue Management Funding Levels (1983–2009)

Notes: Actual budget amounts in millions of 2005 dollars. Does not include general administrative funding for tasks such as administrative support and executive direction. *Source:* Minerals Management Service Budget Justifications for fiscal years 1985 through 2011.

and Operations as well as Compliance and Asset Management subactivities to better reflect “extensive changes to organizations and functional processes resulting from [Revenue Management’s] program-wide reengineering effort that began in FY 1996.”⁹⁹

Somewhat counterintuitively, although Revenue Management was being scrutinized, this critical attention was not complemented by any overt actions by Congress or the Executive Office to discipline the group through budget cuts. In fact, Figure 10.1, which shows MMS’s real budget by function over time, suggests that exactly the opposite was occurring during the period. From fiscal years 1983 through 1992, Revenue Management’s real budget increased by 37 percent. Although it then stagnated and decreased somewhat through 1999, this was followed by another dramatic increase from 2000 through 2002. In all, from 1983 to 2002, MMS saw its appropriations associated with its Revenue Management group increase by almost 50 percent. Although this period was followed by a decline associated with

⁹⁹ Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 2002” (U.S. Department of the Interior, 2001), 22.

the completion of projects to develop computer systems to support both the redesign “of virtually every aspect of [Revenue Management] operations” as well as the newly formed RIK program, throughout the bulk of the period, Royalty Management enjoyed substantial budget growth.¹⁰⁰

In direct contrast, during most of the same period, Offshore Energy’s budget was moving in the opposite direction. With the exception of a brief period in 1991 and 1992 during which appropriations for MMS’s Offshore Energy functions increased in response to heightened environmental concerns stemming from Exxon Valdez, the group’s budget showed a steady decline through the mid-1990s. In total, the change amounted to a 38 percent decrease during the fifteen-year period ending in 1997. Furthermore, these reductions, although more concentrated in the Resource Evaluation and Leasing and Environmental programs within Offshore Energy, significantly affected the Regulatory program as well, which experienced a 24 percent drop in congressional appropriations during the same timeframe. These declines were also associated with reductions in headcount. Although Offshore Energy employed almost 1,100 individuals in 1983, by 1997, staffing had been reduced by 22 percent to 853.¹⁰¹ Conversely, Revenue Management increased its personnel by 48 percent from 466 to 691 over the same interval.

Closer inspection of the changes in Revenue Management appropriations relative to those associated with Offshore Energy reveals further evidence that Congress did not view budgetary decisions as a tool to discipline the perceived inadequacies in the former group’s performance. Table 10.3 shows a difference in means test for relative changes in current and next fiscal year budgets associated with the Revenue Management group compared with the Offshore Energy group. The row “Did Appear Before the Committee” references years in which MMS appeared before the House Committee on Oversight and Government Reform (formerly the Committee on Government Operations) in response to revenue management issues, and the row “Did Not Appear Before the Committee” references years in which the agency did not appear. As the table shows, in those years in which it did appear, Revenue Management enjoyed budget increases in that and the following year that were more than \$9.3 million greater than the corresponding changes in appropriations targeted to Offshore Energy.

¹⁰⁰ Minerals Management Service, “United States Department of the Interior Budget Justification, F.Y. 2003” (U.S. Department of the Interior, 2002), 4; Minerals Management Service, “United States Department of the Interior Budget Justification, F.Y. 2004” (U.S. Department of the Interior, 2003), 219.

¹⁰¹ Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 1985”; Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 1999” (U.S. Department of the Interior, 1998).

Table 10.3. *MMS relative budget changes and revenue management appearances before the House Committee on Oversight and Government Reform (1984–2009)*

Category	Observations	Relative budget change (\$1,000)	Standard error	Statistic
Did appear before committee	6	9,352.23	3,800.20	
Did not appear before committee	20	484.28	1,823.02	
Combined	26	1,785.69	1,815.62	
Difference between did & did not		9,836.50	3,913.09	
t-statistic				2.5137
p value for H_a : Did \neq Did not				0.0191
p value for H_a : Did $>$ Did not				0.0095
p value for H_a : Did not $>$ Did				0.9905

Notes: Relative budget change represents the difference between Revenue Management and Offshore Energy budget increases for any given year. Figures are in thousands of 2005 dollars. Did appear before committee represents budget years in which MMS personnel appeared before the House Committee on Oversight and Government Reform to discuss revenue management issues. The computation of Relative budget change includes both the budget in the year in which MMS personnel appeared as well as the budget in the subsequent year. 2006 committee appearances are not included as Did appear because these involved the leasing and revenue functions. However, their inclusion does not materially change the results. *Sources:* Minerals Management Service Budget Justifications for fiscal years 1985 through 2011 and searches in LexisNexis Congressional database of congressional hearings.

On the contrary, in those years in which MMS was not called by Oversight and Government Reform to testify regarding revenue problems, the relative increase in Revenue Management appropriations was not significantly different from zero. In other words, instead of lowering its budget in response to the problems it was having, Congress actually appears to have shifted more dollars to Revenue Management from Offshore Energy in an attempt to supply the revenue group with resources to deal with its problems. This observation is further bolstered by examining budget changes associated with the aforementioned major reorganizations of Revenue Management effective early in fiscal years 1993 and 2001. In the two fiscal years leading to the completion of each of these restructurings, Revenue Management's budget increased by an average of \$3.3 million more than Offshore Energy's

budget. In the years in between, the revenue group enjoyed relative increases averaging only \$259,000 more than Offshore Energy.

Beyond reorienting MMS's budget between its two functions, during the 1990s Congress also made the decision to allow MMS to increase rental rates – or tax payments on nonproducing leases – by \$2 per acre on each of its lease sales for the express purpose of offsetting the costs of developing a new computer system for its Offshore Energy group.¹⁰² In addition to this increase not applying to royalty payments on properties actually producing oil and gas, the maximum aggregate amount that MMS could use was determined by Congress through the budgeting process.¹⁰³ Although the revenue offsets in budget years 1994 through 1996 were targeted specifically to the creation of this new system and related information management functions,¹⁰⁴ in 1997 Congress authorized MMS to use the rental increase to partially offset costs associated with running its core Resource Evaluation, Leasing and Environment, and Regulatory programs.¹⁰⁵ Not coincidentally, as shown in Figure 10.1, fiscal year 1997 also represented the beginning of a reversal in the previous downward trend in Offshore Energy's budget. Over the next twelve years, the group's real budget increased by 34 percent, ending in 2009 at the level it last achieved in 1986.¹⁰⁶ Furthermore, this growth was shared by all functions, ranging from a 50 percent budget increase for Leasing and Environment to 28 percent growth for the Regulatory program. Although the total number of personnel did not increase during this period, the relative changes in budgets did enable Offshore Energy to stem the previous decline, so that it ended in 2009 with roughly the same number of civil servants as it had in 1997.¹⁰⁷

These observations are summarized in Table 10.4, which displays the results of another difference in means test of yearly changes in Revenue Management's budget relative to changes in Offshore Energy's budget before and after the congressional decision to allow MMS to use the additional rental

¹⁰² Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1996," 109.

¹⁰³ Subcommittee on Interior Appropriations of the Committee on Appropriations, U.S. House of Representatives, "Department of the Interior and Related Agencies Appropriations for 1996" (Hearing, 104th Congress, 1995), 508.

¹⁰⁴ Subcommittee on Interior Appropriations of the Committee on Appropriations, "Department of the Interior and Related Agencies Appropriations for 1996," 508–509.

¹⁰⁵ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1997," 107; Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1998," 108.

¹⁰⁶ Minerals Management Service, "United States Department of the Interior Budget Justification, F.Y. 2011."

¹⁰⁷ *Ibid.*

Table 10.4. *MMS relative budget changes before and after the congressional decision to allow use of revenue receipts (1984–2009)*

Category	Observations	Relative budget change (\$1,000)	Standard error	Statistic
Before congressional authorization	13	6,766.65	2,111.94	
After congressional authorization	13	3,195.28	2,267.16	
Combined	26	1,785.69	1,815.62	
Difference between before & after		9,961.92	3,098.43	
t-statistic				3.2152
p value for H_a : Before \neq after				0.0037
p value for H_a : Before $>$ after				0.0019
p value for H_a : After $>$ before				0.9981

Notes: Relative budget change represents the difference between Revenue Management and Offshore Energy budget increases for any given year. Figures are in thousands of 2005 dollars. Before congressional authorization represents budget years prior to the 1997 decision by Congress to allow MMS to use a \$2 per acre rental rate increase on its lease sales to partially fund the core functions of its Offshore Energy group. After congressional authorization represents budget years after the 1997 decision by Congress and includes fiscal year 1997. Tests substituting funding for each of Offshore Energy's core functions – Resource Evaluation, Leasing and Environmental, and Regulatory – for total Offshore Energy funding yield similar results. *Sources:* Minerals Management Service Budget Justifications for fiscal years 1985 through 2011.

receipts to offset its Offshore Energy budget. As demonstrated through the table, the difference between the two periods is quite dramatic. In the years before Congress's decision, Revenue Management enjoyed yearly budgetary increases which on average amounted to more than \$6.7 million more than the changes to Offshore Energy's budget. In contrast, after Offshore Energy was allowed to offset its budget through the tax, the group's increases amounted to \$3.2 million more per year than Revenue Management received. Thus, although not as large in absolute magnitude, the direction of the association between the two sets of budget changes completely reversed itself with the authorization decision. Not surprisingly, the difference in the relationship between the two periods is statistically significant at the 1 percent level, even using a two-sided test. In sum, the simple statistical analysis supports earlier observations that (a) budget changes for Revenue Management and Offshore Energy generally moved in different

directions, (b) this relationship was moderated somewhat once Congress began to allow MMS to use rental receipts, and (c) the same congressional decision appears to have at least partially contributed to the general increases in Offshore Energy's funding beginning in the late 1990s.

CONNECTING REVENUE COLLECTION TO MMS'S CAPTURE

As described at the outset, numerous commentators have hypothesized that MMS's dual functions as revenue collector and regulator of offshore development led to its capture, a result exacerbated by the authority granted by Congress to Offshore Energy to offset its budget with a portion of those tax dollars it collected. However, when viewed within the context of the organizational development of MMS, such claims are less convincing. At least at the operational level, the vast separation between Revenue Management and Offshore Energy with regard to geography, functions, and systems complicates any claim that inspectors, for example, considered tax collection as they performed their jobs. Instead of operating as a single entity, MMS's dual structure reflected a desire to develop an independent and cohesive revenue management group in Colorado, where some of the function's most senior officials resided. Furthermore, the December 2007 Subcommittee on Royalty Management and September 2008 GAO reports document that – by not relaying production data received from oil and gas companies – Offshore Energy made auditing oil and gas tax submissions more difficult. Thus, instead of assisting tax collection as is claimed, if anything, Offshore Energy was actually impeding the Royalty Management group's ability to accomplish its mission.

Even so, this does not preclude the possibility that capture hampered decision making at MMS's highest levels, where simultaneous involvement in offshore management and revenue collection was more likely. Regardless, the evidence relied on by critics to allege capture of the regulatory arm of Offshore Energy through Revenue Management's pursuit of tax revenue is not focused on these employees. Rather, where the evidence implicates Offshore Energy, it is focused on both the inappropriate gifts from industry representatives to employees in the Lake Charles, Louisiana, office, as well as the allegations by Offshore Energy scientists that they did not exert enough influence over leasing decisions.¹⁰⁸ To the extent that unethical behavior was

¹⁰⁸ Eilperin, "U.S. Oil Drilling Regulator Ignored Experts' Red Flags"; Office of the Inspector General, "Investigative Report: Island Operating Company et al."; Urbina, "U.S. Said to Allow Drilling without Needed Permits."

uncovered at higher levels at MMS, it was associated with Royalty Management, and, in particular, a situation in which three employees orchestrated a contracting arrangement that awarded consulting work to two of them after they retired.¹⁰⁹ Furthermore, congressional decisions related to funding the agency, especially before Congress authorized MMS to offset its appropriations by increasing rental rates to oil and gas companies, highlight the extent to which gains to Revenue Management were offset by budget reductions for Offshore Energy. On balance, this might more plausibly suggest a competition between the two for resources rather than a joint effort to maximize revenue receipts.

The same appropriations data can also be used to analyze the extent to which the congressional decision to allow rental revenue offsets exacerbated conflict within MMS. The evidence that Offshore Energy in general and the Regulatory program in particular began to experience a reversal of their freefalling budgets once Congress allowed MMS's rental rate increase to broadly offset budgetary demands suggests that the effects of this change are complicated. Other factors, including increased political and industry interest in deep water drilling that occurred around the same time, as described in the next section might also have been important in bolstering Offshore Energy's funding. Regardless, a general consensus exists even among MMS's critics that the agency was severely understaffed.¹¹⁰ Therefore, the increases in resources – which were strongly associated with the congressional authorization and which stemmed the massive reductions in Offshore Energy personnel through the mid-1990s – were a positive effect of what most regard as a development that precipitated MMS's failure. Given how operationally separated the revenue collection and offshore energy development groups were, the practical result of such an arrangement in a world of contracting appropriations might reasonably have outweighed any negative consequences associated with it.

Furthermore, the congressional approval only applied to rental receipts, which, as described, were industry payments on nonproducing leases. Even if Offshore Energy did consider oil and gas revenue receipts in its regulatory decision making, the rental increases it would not apply to producing leases that were the primary target of ongoing regulatory oversight, thus obscuring any link between lax oversight and revenue collection. In addition, in theory,

¹⁰⁹ Office of the Inspector General, "Investigative Report: Federal Business Solutions Contracts."

¹¹⁰ Eilperin and Higham, "How the Minerals Management Service's Partnership with Industry Led to Failure"; Flournoy et al., "Regulatory Blowout"; National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, "Deep Water."

such an arrangement should have caused Offshore Energy to become a more – not less – stringent regulator. By denying lessees permits to explore for and produce oil and gas on then nonproducing leases, Offshore Energy would in effect be protecting its funding source because that revenue was only derived from leases not yet yielding oil and gas. However, if it acted as a lax regulator, readily approving permits to drill, Offshore Energy would be eliminating the revenue supply thought to be prompting it to be lax in the first place.

Moreover, Congress and not MMS set the gross level of the offset. As a result, the degree to which the agency would reap the benefits of the rental increase was not directly determined by its own leasing decisions. Because congressional budgetary decisions established the authorized offset in advance, where that level was set below the expected increase in rental receipts, MMS's leasing decisions on the margin would not affect its funding. In fact, this appears to have been the case. In fiscal year 1998, for example, MMS was expected to return \$27 million in increased rental payments to the general Treasury,¹¹¹ indicating that the authorized offset was set at a level well below what the tax increase was expected to produce in additional revenue. Thus, not only did the congressional offset have a more complicated effect on Offshore Energy's incentives than is widely thought, the group's inability to control its funding level further contradicts the claim that the authorization compromised MMS's willingness to regulate adequately.

However, in considering congressional oversight of MMS over its almost thirty years, even the logic associated with the core argument that the competing revenue collection and regulatory missions caused MMS to neglect the latter is weakened. Recalling the patterns associated with oversight hearings and GAO reports, the vast majority of MMS's problems were connected to its function as an oil and gas revenue collector. Conversely, Offshore Energy received little critical attention from Congress throughout most of its existence. In fact, as described in the next section, until 2010, the group was widely regarded as successfully performing its functions as demonstrated through the numerous awards and general approval it received politically. Therefore, to the extent that MMS was struggling, it was struggling in the opposite way relative to the prediction of a theory that suggests that MMS's conflicting revenue and regulatory functions caused its capture. In such an account, MMS's subversion of its role as OCS steward to succeed as a

¹¹¹ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1999," 92.

revenue collector would be expected to show some outward signs that this was occurring. Stated differently, one should have expected to see indications that MMS's regulatory structure was being compromised to promote its efficient performances of its revenue function – not the reverse.

Combining these data points, the possibility that MMS's capture and failure were precipitated by its initial organizational structure, which linked offshore oversight and revenue, becomes less likely. This is not to say that such a hypothesis is completely without merit or impossible, given the reality of the environment surrounding MMS. Rather, the evidence demonstrates that it is prudent to remain guarded to assertions that the initial decision to consolidate offshore regulatory functions with revenue collection was a primary driver for MMS's capture, bound to eventually lead to something like the *Deepwater Horizon* disaster. Given that similar thinking triggered an organizational solution through Order 3299 that has been shown to have significant costs of its own, these results merely suggest that it can be important to consider the complete set of evidence before advancing with a radical policy shift such as the decision to eliminate MMS.

POLITICAL TRENDS, CHANGING TECHNOLOGY, AND BALANCING MULTIPLE OBJECTIVES AT MMS

At the same time it was experiencing changes to its budget structure, related political and environmental developments were simultaneously affecting the breadth of Offshore Energy's duties. As noted previously, although it did not directly involve OCS operations, the Exxon Valdez spill in 1989 still had important implications for MMS. In addition to prompting congressional hearings to review environmental and regulatory concerns, the Oil Pollution Act of 1990 bestowed additional responsibilities on MMS in connection with oil spill response planning and research while, at the same time, expanding Offshore Energy's ability to use penalties to enforce its regulations.¹¹² Furthermore, a series of moratoria issued through Congress and President George H. W. Bush in the wake of the spill substantially affected MMS operations. In his Statement on Outer Continental Shelf Oil and Gas Development in June 1990, President Bush communicated his intent to impose bans on drilling and development for the southwest coast of Florida, 99 percent of the California coast, and Oregon and Washington

¹¹² Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1992," 31, 81–83, 91; Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1994," 82–83.

waters until 2000 under the authority granted him through the OCSLA.¹¹³ In addition, he declared a moratorium on development in the North Atlantic and authorized the buyback of leases already issued in Florida, prompting Offshore Energy to reacquire lands that it had already sold.

These moratoria were both supported and subsequently expanded by Congress. For example, the Department of the Interior and Related Agencies Appropriations Act passed in 1993 prohibited funds from being used to support leasing activities in additional areas in the eastern Gulf as well as the remainder of the Atlantic coast.¹¹⁴ A subsequent Appropriations Act from 1997 further extended this prohibition to the North Aleutian Basin off the Alaska Peninsula.¹¹⁵ President Clinton's June 1998 Memorandum for the Secretary of the Interior both extended George H. W. Bush's moratoria and added to the list other leasing areas already identified through congressional legislation.¹¹⁶ In response to the moratoria and President Clinton's Executive Order 12,839, which directed agencies to eliminate 4 percent of their staff by 1995,¹¹⁷ Offshore Energy closed its Atlantic office and scaled back operations in its Pacific and Alaska offices as well.¹¹⁸

Even so, the late 1980s and early 1990s appear to have marked the high point for political concern over environmental and regulatory issues in connection with OCS oil and gas development. More broadly, as part of his plan to produce a government that "works better, costs less, and gets results Americans care about,"¹¹⁹ in 1993, President Clinton launched the National Partnership for Reinventing Government, an initiative emphasizing performance-based and other more innovative approaches to regulation. These efforts were reinforced in President Clinton's Executive Order 12,866, which explicitly established a role for market-based regulatory methods such as marketable permits, performance standards, and negotiated

¹¹³ George H.W. Bush, "Statement on Outer Continental Shelf Oil and Gas Development" (The American Presidency Project, June 26, 1990).

¹¹⁴ Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, §107 (1993).

¹¹⁵ Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, §109 (1997).

¹¹⁶ William J. Clinton, "Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition" (The American Presidency Project, June 12, 1998).

¹¹⁷ William J. Clinton, "Executive Order 12,839 – Reduction of 100,000 Federal Positions," *Federal Register* 58 (1993): 8515.

¹¹⁸ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1996," 100.

¹¹⁹ John Kamensky, "A Brief History," National Partnership for Reinventing Government .com, 1999, <http://govinfo.library.unt.edu/npr/whowere/history2.html>.

rulemaking.¹²⁰ However, in addition to setting out a blueprint for regulatory innovation, President Clinton's program, which also aimed to consolidate and eliminate unnecessary government functions, targeted MMS as an agency initially subject to termination by October 1997.¹²¹ As late as March 1995, the House Interior Appropriations Subcommittee was still considering the possibility that the functions of MMS would be dispersed throughout Interior, with oversight for state and Indian royalty collection in particular being outsourced to the beneficiaries themselves.¹²² Even so, after a series of hearings during 1995 in which several observers noted the "irony" of the proposals, because they would in effect represent a return to the situation that prompted MMS's creation, Congress ultimately decided not to "devolve the functions of the MMS."¹²³

In response to President Clinton's Reinventing Government program, MMS began to experiment with negotiated rulemaking almost immediately. In addition to forming a committee to study and propose revised gas valuation rules,¹²⁴ MMS organized negotiations between itself, local governments, and industry to reach compromises on contentious leasing issues on the Pacific OCS.¹²⁵ This foray into negotiated rulemaking was part of a broader plan by MMS to update its regulatory strategy in reaction to political and industry developments.

By the early 1990s, oil and gas operations in the Gulf as well as the Pacific OCS region were changing in two associated ways. The first shift reflected an increasing role for small development companies, referred to as independents by MMS and the industry, as integral players in bringing oil and gas to the market. During the seven years from 1985 to 1992, the number of operators producing in the Gulf roughly doubled from 64 to 133.¹²⁶ Independents often entered the market by purchasing already

¹²⁰ William J. Clinton, "Executive Order 12,866 – Regulatory Planning and Review," *Federal Register* 58 (1993): 51735–44.

¹²¹ Bonora and Gallagher, "Retrospective."

¹²² Subcommittee on Interior Appropriations of the Committee on Appropriations, "Department of the Interior and Related Agencies Appropriations for 1996," 500–501.

¹²³ Subcommittee on Energy and Mineral Resources of the Committee on Resources, U.S. House of Representatives, "Minerals Royalty Management" (Hearing, 104th Congress, 1995); Subcommittee on Energy and Mineral Resources of the Committee on Resources, U.S. House of Representatives, "MMS Devolution and OCS Royalty Stream Sales" (Hearing, 104th Congress, 1995b); Bonora and Gallagher, "Retrospective."

¹²⁴ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1996," 8; D. Cedar-Southworth, "Regulatory Reform – It's Working at MMS," *MMS Today* Summer (1996): 4–5.

¹²⁵ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1996," 11.

¹²⁶ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1994," 82.

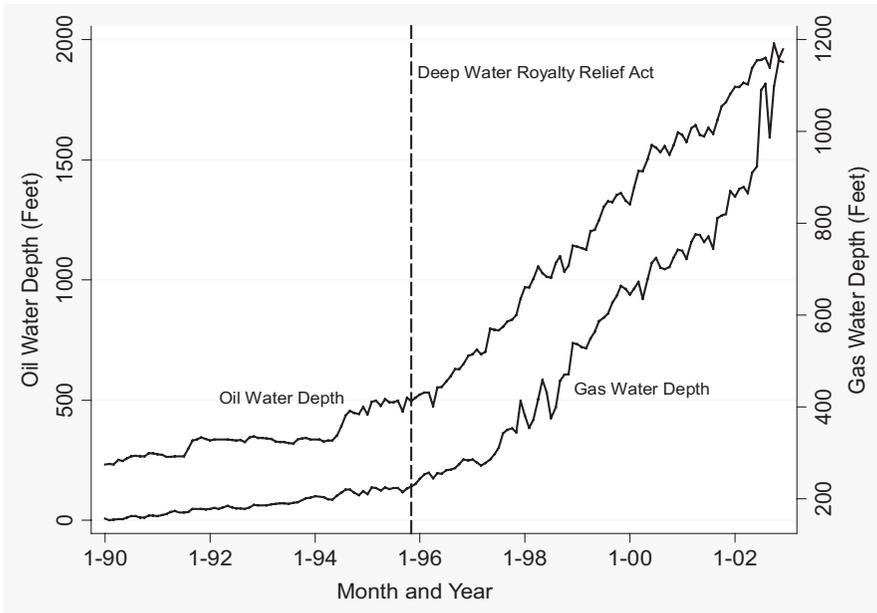


Figure 10.2. Average Water Depth of Oil and Gas Production in the Gulf of Mexico (January 1990–December 2002)

Notes: Oil Water Depth refers to the average weighted water depth of oil production in the Gulf during that month. Gas Water Depth is the same measure for gas. The average monthly water depth is computed as the average water depth of all producing wells weighted by each well’s production in that month. Source: MMS’s OGOR-A Well Production data and BOEMRE’s Offshore Statistics by Water Depth database.

producing oil and gas leases from large companies called majors with the hope that lower levels of overhead would enable them to operate these maturing properties more profitably. Largely as a result of the moratoria on drilling in the eastern Gulf as well as parts of Alaska issued by President H. W. Bush after Exxon Valdez,¹²⁷ majors were increasingly focusing their attention on more promising overseas markets, a move that intensified the influx of independents.¹²⁸

However, soon after majors’ interest in the shallow waters of the Gulf waned, these companies began to look to deep water production in waters greater than 200 meters as a potential source of new growth. Figure 10.2, which shows the average water depth of oil and gas production in the Gulf of Mexico weighted by total output, reflects this trend. As the figure suggests, instrumental in this growth was the Deep Water Royalty Relief Act, passed in

¹²⁷ Bush, “Statement on Outer Continental Shelf Oil and Gas Development.”

¹²⁸ Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 1994,” 82.

November 1995, which amended the OCSLA to suspend royalty payments on western and central Gulf deep water leases offered through the middle of November 2000 until significant amounts of oil and gas had been produced on those leases. Once the associated company applied for relief, the Act also extended to existing leases in which “new production would not be economic in the absence of the relief from the requirement to pay royalties.”¹²⁹ In the five years leading up to the Act, the average water depth of oil production in the Gulf increased by less than four feet per month. In the five years after, the average water depth increased by almost eighteen feet per month, well over a four-fold increase. The relative numbers were even more dramatic for natural gas, for which the pace of monthly increases was more than eight times greater in the sixty months after the congressional legislation.

In response to the changing political and operational environment associated with Gulf oil and gas development in the early to mid-1990s, Offshore Energy made two changes to its regulatory strategy. First, it started to direct more of its attention toward overseeing the operations and developing rules to ensure the financial viability of the newly arriving independents. As described in its 1996 Budget Justification:

Significant resources will continue to be employed in the offshore inspection program with particular emphasis on small operators to ensure operations are conducted in a safe and environmentally sound manner. Many small operators are underfunded or understaffed, thus necessitating a higher level of inspection effort and monitoring of operations to ensure compliance with applicable safety and environmental regulations and requirements.¹³⁰

The shift also extended to rule promulgation, where, for example, MMS updated its bonding rule to require supplemental protection to ensure that small companies would have sufficient resources to clear their sites at the end of leases.¹³¹ As a complement to this approach, Offshore Energy began to also experiment with random sampling techniques to determine who to inspect as a mechanism to manage the increasing number of operators because staffing was declining at the same time.¹³² A subsequent 1998 MMS commissioned study analyzing oil spill data to test whether independents actually did perform worse than majors did not find evidence to support this fear. However, importantly, the study reiterated that such a view was

¹²⁹ Outer Continental Shelf Deep Water Royalty Relief Act, Pub. L. No. 104-58, §302 (1995).

¹³⁰ Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 1996,” 86.

¹³¹ Minerals Management Service, “Bond Requirements for Offshore Oil and Gas Facilities to Increase” (Press Release No. 30040, September 8, 1993).

¹³² Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 1994,” 89.

common among industry observers, suggesting that there was “widespread concern that an expected increase in the independents’ relative share of exploration and production (E&P) operations in the Gulf OCS region [would] be detrimental to worker safety or the marine environment.”¹³³

The second change involved an equally public decision by MMS to work with industry to jointly develop standards for deep water drilling and production. Fundamental to that effort was MMS’s participation in the Deep-Star Research Project, which brought together sixteen oil and gas companies as well as forty vendors to develop technology and systems capable of extracting oil and gas in deep water.¹³⁴ Because the large oil and gas companies were those with the financial resources and capabilities to consider drilling in deep water, MMS’s efforts to collaborate centered on its interactions with major producers. Still, the agency’s shift to a more cooperative stance to develop standards and a regulatory infrastructure was a function of the nascence of deep water technology at the time. As described by Associate Director Carolita Kallaur at a 2001 talk at the Institute of Petroleum’s International Conference on Deepwater Exploration and Production:

An HSE [health, safety, and environmental] lesson learned from our early experience with GOM [Gulf of Mexico] deepwater development is that there is tremendous value from collaboration between government, industry and the scientific community in the area of research and operational requirements. This is particularly true if it is found that the operating environment is totally different from what one is used to, and it is critical to be able to “think out of the box.”¹³⁵

Given that neither MMS nor its regulated entities knew how to conduct deep water operations, the agency determined that the best way to develop the capabilities was to work with industry in doing so. In response to the move to deep water and the increasing role for independents, the Regulatory program also developed a two-part formal inspector training program aimed at dealing with these changes.¹³⁶

¹³³ Coastal Marine Institute, “Environmental and Safety Risks of an Expanding Role for Independents on the Gulf of Mexico OCS” (OCS Study MMS 98-0021, 1998), 35.

¹³⁴ OCS Policy Committee’s Subcommittee on OCS Legislation, *The Outer Continental Shelf Oil and Gas Program – Moving beyond Conflict to Consensus* (Washington, D.C.: OCS Policy Committee, 1993), 65–66; Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 1997,” 85.

¹³⁵ C. Kallaur, *The Deepwater Gulf of Mexico – Lessons Learned*, in *Proceedings of the Institute of Petroleum’s International Conference on Deepwater Exploration and Production in Association with OGP* (Washington, D.C.: Bureau of Ocean Energy Management, Regulation and Enforcement, 2001).

¹³⁶ Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 1996,” 92.

In some ways, the shift toward collaboration represented a new approach to regulation for Offshore Energy. Responding to a 1993 report submitted by the OCS Policy Committee – a group that included representation from coastal states, environmental groups, and industry – Secretary of the Interior Babbitt indicated in a letter to the Committee that one of its most important recommendations was “that the OCS program should be regenerated based on consensus.”¹³⁷ Regardless, this was not the first time that the energy management function at MMS had used a collaborative approach to deal with emerging technologies. As early as the mid-1980s, MMS was cooperating with oil and gas companies to test and develop technologies to deal with the extreme conditions in the waters surrounding Alaska.¹³⁸ Furthermore, at that time, the Technology Assessment and Research Program element within Offshore Energy was even engaging industry to test platforms destined for deeper water around California and in the Aleutian area of southwest Alaska.¹³⁹

As evidence of the broad support for its programs, Offshore Energy garnered several awards during the mid to late 1990s, including two Vice Presidential Hammer Awards, two Environmental Quality Awards, the Interior’s Steve Kelman award for procurement franchising, and the Los Angeles Federal Executive Board’s Heroes of Reinvention award for its collaborative approach toward oil and gas development in the Pacific OCS region.¹⁴⁰ In particular, MMS received its 1997 Hammer Award for its “several major reinvention streamline processes” and its efforts to “become customer focused.”¹⁴¹ One year earlier, MMS received one of two 1996 Federal Environmental Quality Awards given out by the Council on Environmental Quality for “its actions to integrate environmental values into its agency mission and its commitment to excellence in environmental decision making.”¹⁴²

Simultaneously, as shown in Figure 10.3, oil spills from OCS activities – as measured in barrels of crude oil, condensate, and other chemicals spilled as

¹³⁷ Minerals Management Service, “OCS Legislative Group Wades into Controversy; Finds Consensus Elusive but Possible” (Press Release No. 40065, September 21, 1994).

¹³⁸ Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 1985,” 66.

¹³⁹ *Ibid.*

¹⁴⁰ Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 1996,” 11; Bonora and Gallagher, “Retrospective.”

¹⁴¹ Hammer Awards, “The Minerals Management Service” (Department of the Interior/MMS, October 1, 1997).

¹⁴² Office of Communications, “MMS Wins National Environmental Award” (Press Release, U.S. Department of the Interior, Minerals Management Service, 1996).

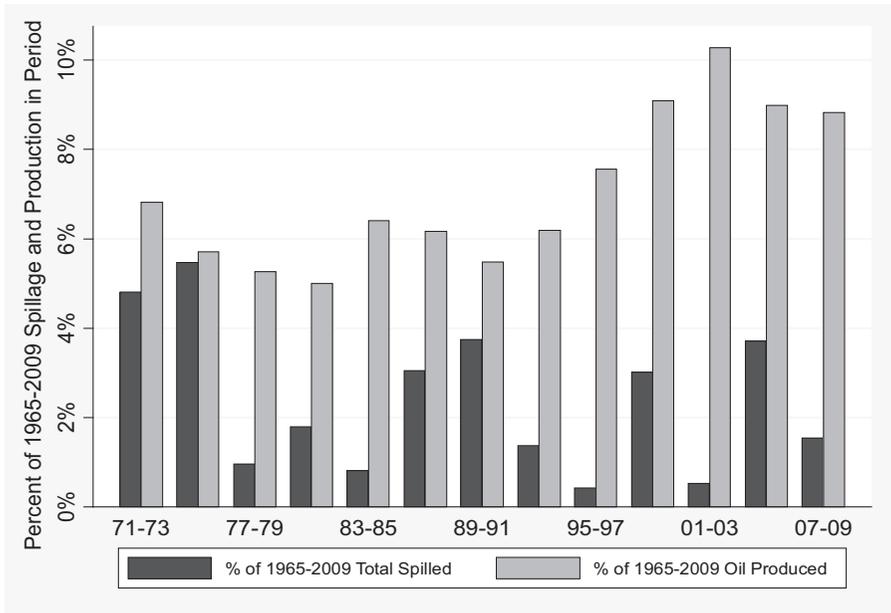


Figure 10.3. Percent of Total 1965–2009 OCS Barrels Spilled and Oil Produced in Successive Three Year Periods

Notes: For each three year period from 1965 through 2009, the vertical axis measures the percent of total barrels spilled as well as oil produced during that period relative to the entire 45 years. Barrels spilled is defined as total crude oil, condensate, and other chemicals spilled for spills of one or more barrels associated with OCS activities. Total oil production is defined as total federal OCS crude oil and condensate production in barrels. The periods 1965 to 1967 and 1968 to 1970 are removed to facilitate exposition as those periods were marked by relatively high spillage and would otherwise obscure differences in later periods. The period from 2004 to 2006 includes spills resulting from damage attributed to Hurricane Katrina. Source: BOEMRE spreadsheets titled Federal OCS Oil & Gas Production as a Percentage of Total U.S. Production: 1954–2010 and All Petroleum Spills ≥ 1 Barrel from OCS Oil & Gas Activities by Size Category and Year, 1964 to 2009.

a percentage of the total spilled during the entire period from 1965 to 2009 – were at an all-time low in the early to mid-1990s.¹⁴³ Relative to the six-year period from 1965 through 1970 when drilling and production resulted in almost 380,000 barrels being deposited into offshore waters, the period from 1992 to 1997 produced only 10,000 spilled barrels. Furthermore, except for a brief uptick between 2004 and 2006 associated with the damage to offshore platforms from Hurricane Katrina, spillage rates did not display

¹⁴³ Minerals Management Service, “United States Department of the Interior Budget Justifications, F.Y. 1996,” 43.

any obvious upward trend prior to the *Deepwater Horizon* accident, despite climbing production and the move to deeper water. MMS's aforementioned 1998 commissioned study of independent oil and gas companies cogently summarized these observations, suggesting "it should be noted that the data available show a remarkable decline in accidents and oil spills over the past two decades."¹⁴⁴ In addition, in a question and answer session less than three weeks prior to the *Deepwater Horizon* explosion and fire, President Obama reiterated this view, suggesting "oil rigs today generally don't cause spills. They are technologically very advanced."¹⁴⁵

In addition to legitimizing collaborative regulatory tactics through President Clinton's Reinventing Government initiative, executive policy during the presidency of George W. Bush further intensified the push to expand offshore oil and gas exploration. President Bush's efforts began in January 2001 with the creation of the controversial National Energy Policy Development Group, chaired by Vice President Dick Cheney. More commonly known as the Energy Task Force, the group was subsequently criticized for not adequately incorporating environmental groups' input in developing its recommendations for a national energy strategy four months later.¹⁴⁶ Furthermore, although President Bush's January 2007 Memorandum for the Secretary of the Interior made only minor alterations to existing moratoria to ensure its consistency with the Gulf of Mexico Security Act,¹⁴⁷ his 2008 Memorandum resulted in dramatic changes, opening up all areas of the OCS with the exception of those designated as marine sanctuaries.¹⁴⁸ In his accompanying remarks, President Bush noted, "One of the most important steps we can take to expand American oil production is to increase access to offshore exploration."¹⁴⁹ He further implored Congress to relax its restrictions on its appropriations bills. Only weeks before the *Deepwater Horizon* disaster, President Obama echoed President Bush's enthusiasm for

¹⁴⁴ Coastal Marine Institute, "Environmental and Safety Risks," 37.

¹⁴⁵ Barack Obama, "Remarks by the President in a Discussion on Jobs and the Economy in Charlotte, North Carolina" (The White House, Office of the Press Secretary, 2010).

¹⁴⁶ Michael Abramowitz and Steven Mufson, "Papers Detail Industry's Role in Cheney's Energy Report," *Washington Post* (July 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071701987.html>; Eilperin and Higham, "How the Minerals Management Service's Partnership with Industry Led to Failure."

¹⁴⁷ George W. Bush, "Memorandum on Modification of the June 12, 1998 Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition" (The American Presidency Project, January 9, 2007).

¹⁴⁸ George W. Bush, "Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition" (The American Presidency Project, July 14, 2008).

¹⁴⁹ George W. Bush, "Remarks on Energy" (The American Presidency Project, July 14, 2008).

Table 10.5. *Summary of important statutes enacted pertaining to offshore energy or revenue management (1982–2010)*

Public law	Name of act	Year	Summary
97-451	Federal Oil and Gas Royalty Management Act	1983	Provided for accounting and auditing systems to determine oil and gas payments
99-272	Outer Continental Shelf Lands Act Amendments	1986	Established policy for providing information to coastal states related to development
101-380	Oil Pollution Act	1990	Established fund for oil pollution damages and provided for oil spill research
102-486	Energy Policy Act	1992	Required Interior to disburse monthly to states all mineral leasing payments
104-58	Deep Water Royalty Relief Act	1995	Provided royalty relief for offshore drilling in deep water of Gulf
104-185	Federal Oil and Gas Royalty Simplification and Fairness Act	1996	Established statute of limitations on royalty collections and appeal limits
109-58	Energy Policy Act	2005	Authorized Interior to develop alternative energy program on OCS
109-432	Gulf of Mexico Energy Security Act	2006	Required lease offerings for certain areas in Gulf previously under moratoria

Sources: Various Congressional Research Service summaries, Minerals Management Service Budget Justifications for fiscal years 1985 through 2011, and the public laws themselves.

further offshore drilling, removing only the Bristol Bay area from leasing consideration and proclaiming in an associated speech that “today we’re announcing the expansion of offshore oil and gas exploration.”¹⁵⁰

Contrary to President George W. Bush’s claim for the opposite, Congress appears to have supported this policy shift as well. Table 10.5 – which summarizes the important laws focused on either Offshore Energy or Revenue Management enacted during MMS’s existence – provides some evidence. Beginning with the Deep Water Royalty Relief Act in 1995, the

¹⁵⁰ Barack Obama, “Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition” (The American Presidency Project, March 31, 2010); Barack Obama, “Remarks of President Obama on Energy Security” (The American Presidency Project, March 31, 2010).

primary focus of each law Congress adopted for the subsequent fifteen years was on either encouraging offshore development or modifying royalty collection rules and operations. For example, although it represented a compromise by extending moratoria on waters near the Florida coast, the Gulf of Mexico Energy Security Act required Offshore Energy to offer within one year 8.3 million acres for leasing, 5.8 million of which were previously prohibited by either Congress or the president. With its emphasis on production relative to environmental preservation, this fifteen-year period stands in contrast with the first thirteen years of MMS's existence during which acts such as the 1986 OCSLA Amendments and the 1990 Oil Pollution Act revealed a congressional desire for more cautious development of oil and natural gas in offshore waters.

However, this evolution is perhaps most clearly demonstrated by recounting Table 10.2, which provides a tabulation of hearings in which MMS personnel appeared by the associated agency function or functions. As described, over the last twelve full years of MMS's existence prior to its disbanding in 2010, leasing issues were a focus in fourteen hearings and evaluation issues in eighteen hearings, whereas environment and regulation combined were subjects of only thirteen hearings. Yet even these numbers for environment and regulation are artificially inflated because hearings associated with laws to expand production still invited environmental groups to participate. Focusing specifically on regulation, one finds that the numbers are even more striking. Whereas over its first thirteen years, a total of twenty-two hearings involved an important discussion of offshore regulation, during MMS's subsequent fifteen years ending in 2009, only one hearing included any extended discussion of regulatory issues. Furthermore, even that case was fundamentally focused on a proposal to shift BLM's onshore regulatory responsibilities to the affected states and included very little mention of MMS's offshore regulatory program.¹⁵¹

Finally, evidence from public opinion surveys indicates that shifting congressional and presidential preferences over the period appear to have also reflected public sentiment on energy issues. Figure 10.4 shows Gallup Poll results over repeated samplings from September 1984 through May 2010 in which respondents were asked whether protection of the environment or economic growth should receive priority given that the other would suffer. The graph represents a ratio of the percentage that preferred environmental protection relative to the percentage that preferred growth. Although

¹⁵¹ Subcommittee on Energy and Mineral Resources of the Committee on Resources, U.S. House of Representatives, "BLM Oil and Gas" (Hearing, 104th Congress, 1996).

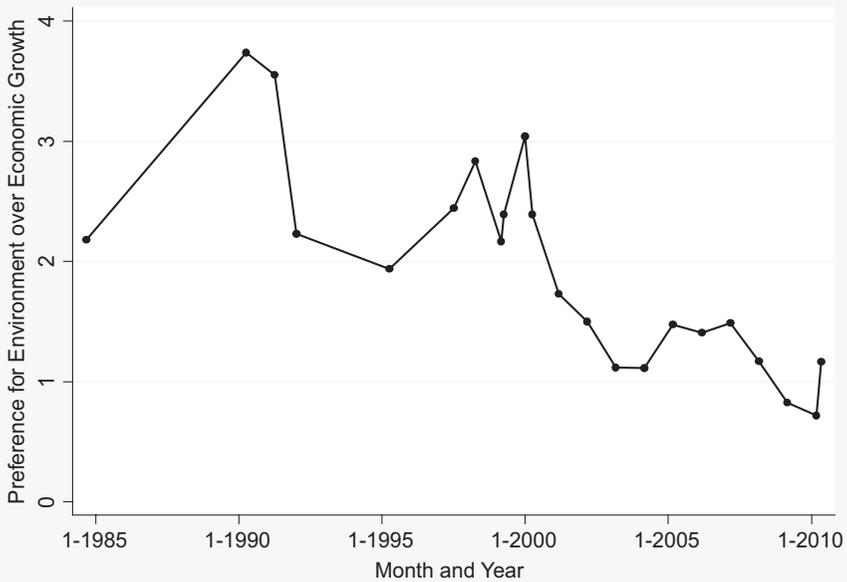


Figure 10.4. Gallup Opinion Poll Results Measuring Preference for Environmental Protection or Economic Growth (1984–2010)

Notes: Data from Gallup polls taken between 1984 and 2010 which asked “With which of these statements about the environment and the economy do you most agree – [ROTATED: protection of the environment should be given priority, even at the risk of curbing economic growth (or) economic growth should be given priority, even if the environment suffers to some extent?” Preference for Environment over Economic Growth is a ratio computed by dividing the percent of people that placed greater importance on environmental protection by the percent that preferred economic growth. Source: Gallup 2010. *Economy, Energy vs. Environment*. Poll. <http://www.gallup.com/poll/137888/Energy-Environment.aspx>.

the move toward greater interest in economic growth is not a continuous progression, the trend is evident. As the figure describes, although people preferred environmental protection to economic growth at almost a four-to-one ratio in 1991, the drift toward economic growth is accelerated beginning in 2000. By early 2009, the ratio dips below one, indicating for the first time in the poll’s history that more people actually favored economic growth over environmental protection.

Even after the *Deepwater Horizon* spill, when people’s relative concern shifted back toward the environment, the imbalance between the percentage that preferred the environment relative to the percentage that preferred economic growth was nowhere close to that displayed in the wake of Exxon

Valdez. Although Gallup later began to ask people specifically about prioritizing environmental protection or energy production, it only did so beginning in March 2001, and so the data are less instructive. Even so, except for a move back in 2007, these polls display a general shift toward greater emphasis on development relative to environmental protection as well. In the first year of the poll, 52 percent placed greater priority on the environment relative to 36 percent for energy production. By March 2010, only 43 percent favored environmental protection, whereas 50 percent placed precedence on developing energy supplies. Like the former poll, at the end of May 2010, after the oil spill, preference for the environment had again overtaken development, and the spread between the two was again 16 percentage points, as it had been when the poll was first taken in 2001.¹⁵²

CONSIDERING POLITICAL AND PUBLIC PREFERENCES IN A THEORY OF MMS'S CAPTURE

As demonstrated by several authors in this book, the challenges in detecting capture are substantial. Thus it should not be surprising that differentiating between a productive cooperative regulatory relationship and a captured one is also difficult. It is certainly true that a fine line exists between collaboration and capture, and much research has attempted to detail that division, given the potential gains to both parties as well as to the public from cooperative regulatory structures.¹⁵³ Furthermore, even when a regulator appears to treat certain incumbent regulated entities preferentially, such evidence does not necessarily imply that the agency is captured by those same entities.¹⁵⁴ Rather, given a history of solid interactions with these firms, even

¹⁵² Gallup, "Economy, Energy vs. Environment," 2010, <http://www.gallup.com/poll/137888/Energy-Environment.aspx>.

¹⁵³ Steven Kelman, *Regulating America, Regulating Sweden: A Comparative Study of Occupational Safety and Health Policy* (Cambridge, MA: MIT Press, 1981); Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia, PA: Temple University Press, 1982); John T. Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement," *Law Society Review* 18 (2) (1984): 179–224; John T. Scholz, "Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness," *American Political Science Review* 85 (1) (1991): 115–36; Cary Coglianese, Richard Zeckhauser, and Edward Parson, "Seeking Truth for Power: Information Strategy and Regulatory Policymaking," *Minnesota Law Review* 89 (2004): 277–341. For a review of this literature, see Christopher Carrigan and Cary Coglianese, "The Politics of Regulation: From New Institutionalism to New Governance," *Annual Review of Political Science* 14 (2011): 107–29.

¹⁵⁴ Daniel P. Carpenter, "Protection without Capture: Product Approval by a Politically Responsive, Learning Regulator," *American Political Science Review* 98 (4) (2004): 613–31; Daniel P. Carpenter, Susan I. Moffitt, Colin D. Moore, Ryan T. Rynbrandt, Michael

a public-spirited regulator will favor them if they are attempting to maximize public welfare.

Faced with an influx of independents and congressional legislative action intent on stimulating deep water exploration, Offshore Energy's decision to focus more of its dwindling budgetary resources on the inexperienced actors while relaxing its oversight of those with whom it was most familiar represents in many ways a clear application of the aforementioned logic. Regardless of whether subsequent analysis indicated that newcomers were not more prone to spills, the choice is properly evaluated within the context of available data and the common perception that independents were not as safe when MMS made the decision. Furthermore, the circumstances under which it did so exactly mirror its decision to collaborate with established producers at least ten years earlier – an emerging technology in which all players had little knowledge of how to predict or overcome potential obstacles. Thus Offshore Energy's decision to center its inspection efforts on new industry players given the changing conditions of oil and gas production in the 1990s appears both consistent with its previous behavior when faced with untested technologies as well as plausible, even if it were a regulator whose intent was to maximize public welfare. In addition, it would explain why, in justifying its cooperative stance toward major producers, MMS pointed repeatedly to the industry's aforementioned excellent safety record with regard to oil spills and accidents.¹⁵⁵

Regardless, as highlighted at the outset of this chapter, the 2008 and 2010 OIG memoranda – particularly the latter chronicling the activities of members of Offshore Energy's Lake Charles district office – provide reason to suspect that MMS was captured, at least in specific cases. Even setting aside these salient examples, it is hard to imagine that James Kwak's conception in this volume of "cultural capture" is not at all applicable to the interplay between at least some MMS inspectors and their industry counterparts. As Kwak describes, cultural capture is the condition whereby regulators

M. Ting, Ian Yohai, and Evan J. Zucker, "Early Entrant Protection in Approval Regulation: Theory and Evidence from FDA Drug Review," *Journal of Law, Economics, and Organization* 3 (2) (2009): 243–77.

¹⁵⁵ Minerals Management Service, "United States Department of the Interior Budget Justifications, F.Y. 1996," 43; Subcommittee on Interior Appropriations of the Committee on Appropriations, "Department of the Interior and Related Agencies Appropriations for 1996," 481; D. Francois and W. Bonora, "Agency Places a Premium on Safety," *MMS Today* Fall (1998): 1, 3–4; C. Quarterman, "Message from the Director," *MMS Today* Spring 2 (1998): 2, 5; P. Velez, "Safety and Environmental Protection: A Collaborative Approach," *MMS Today* Fall (1998): 5, 11; Bonora and Gallagher, "Retrospective," 9; Minerals Management Service, "United States Department of the Interior Budget Justification, F.Y. 2003," 108.

and regulated entities develop closely aligned understandings of the world, which encourages regulatory action that favors industry (Chapter 4). The fact that relationships between oil and gas workers and MMS employees “were formed well before they joined industry or government”¹⁵⁶ certainly implies that these individuals were likely to hold similar views of offshore operations and safety. This does not mean that there even needed to be any conscious intent that drove these beliefs. As acting Inspector General Kendall explained, “the MMS employees I have met who have come from industry are highly professional, extremely knowledgeable, and passionate about the job they do.”¹⁵⁷ Still, the well-known centrifugal forces that can drive regulators in the field to empathize with their industry counterparts¹⁵⁸ would seem to be important factors in understanding the dynamics of the interplay between MMS and the oil and gas industry. In fact, Director Birnbaum’s testimony at the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling hearings implies that a mutual understanding was inherent to the job. As she described, “the training necessary to understand the operations of oil and gas drilling rigs and platforms is not available in schools. It’s something like being an auto mechanic. In order to understand how things work, you have to spend some time under the hood.”¹⁵⁹ In a sense, part of the purpose of utilizing collaborative regulatory approaches is to facilitate such shared conceptions.

Ultimately, however, any discussion of the extent to which MMS’s behavior reflected capture or collaboration cannot be divorced from the political and social circumstances in which it operated. As described, this history presents clear evidence that Offshore Energy’s decision to cooperate with industry was not made on its own. Not only was the choice to proactively engage industry in developing deep water production standards a public one, the strategy was broadly supported, as evidenced through the variety of awards MMS received in the mid to late 1990s for its innovative regulatory methods. As MMS’s experience with negotiated rulemaking suggests, in many cases, such efforts were even directly prompted by political policy choices. Furthermore, such prompting was not necessarily solely relegated

¹⁵⁶ Mary L. Kendall, “Testimony of Mary L. Kendall, Acting Inspector General for the Department of the Interior, before the Committee on Oversight and Government Reform” (U.S. House of Representatives, July 22, 2010).

¹⁵⁷ Mary L. Kendall, “Testimony of Mary L. Kendall.”

¹⁵⁸ Herbert Kaufman, *The Forest Ranger* (Baltimore, MD: Johns Hopkins University Press, 1960); Peter Selznick, *TVA and the Grass Roots: A Study of Politics and Organization* (Berkeley, CA: University of California Press, 1984).

¹⁵⁹ S.E. Birnbaum, “Transcript of Testimony before the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling” (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, 2010).

to the Executive Office or Congress. The OCS Policy Committee that, in 1993, stressed the need for MMS's strategy with regard to oil and gas development to be "regenerated based on consensus" incorporated the views of a broad set of interested parties.¹⁶⁰

Beyond simply influencing MMS's choice of regulatory strategy, presidential and congressional policy decisions reveal that MMS followed its broad political mandate, even if one believes the group overemphasized expansion of offshore oil and gas production during its last fifteen years. As described, beginning by at least the mid-1990s, congressional and executive attention was focused on exploration, production, and revenue collection, with little regard for MMS's regulatory functions. Weakening presidential moratoria and a pattern of lawmaking after the Oil Pollution Act of 1990 that emphasized production provided clear direction to MMS on political priorities. Perhaps this is best exemplified through the Deep Water Royalty Relief Act, which permitted royalty relief with the explicit goal of encouraging deep water drilling, even when the technology was not available to support it safely.¹⁶¹ As recounted in MMS's 2005 Budget Justification, this law "triggered record-breaking lease sales in 1997 and 1998 . . . and opened the door to increased deepwater production."¹⁶²

Moreover, public opinion data appear consistent with presidential and congressional preferences as well. The Gallup poll results indicate that during the latter half of the 1990s and throughout the 2000s, public preferences also shifted toward favoring the expansion of production. In addition to being concordant with the actions of relevant political actors, this evidence further supports the notion of a more general desire to shift policy away from environmental protection. MMS Director Randall Luthi's comments connected to a controversial lease sale in Alaska's Chukchi Sea in 2008 show a clear awareness of this shift. He stated, "Our nation's demand for energy is increasing. Meeting that demand through carefully managed domestic production has to be a priority. Our first priority, though, is that all activity on the OCS be conducted safely and in an environmentally responsible manner."¹⁶³

As a conceptual matter, capture theorists have historically asserted – in keeping with how the term is defined by Daniel Carpenter and David

¹⁶⁰ Minerals Management Service, "OCS Legislative Group Wades into Controversy."

¹⁶¹ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, "Deep Water."

¹⁶² Minerals Management Service, "United States Department of the Interior Budget Justification, F.Y. 2005," 80.

¹⁶³ Randall Luthi, "Remarks Prepared for MMS Director Luthi, Chukchi Sea Sale 193, February 6, 2008" (Minerals Management Service, 2008).

Moss in the Introduction to this volume – that an agency is captured when it regulates for industry in opposition to the public interest.¹⁶⁴ To the extent that elected presidents and legislative mandates are assumed to reflect that interest, the activities of Offshore Energy do not appear to have satisfied the second part of the definition. Of course, this does not eliminate the possibility that politicians were the actors actually captured,¹⁶⁵ and MMS simply followed their lead. Even so, the fact that the public was also firmly behind the shift toward emphasizing energy development substantially limits the applicability of even this characterization of capture. Thus, to the extent that MMS was actually fulfilling its mandate and a broad view of the public interest, categorizing MMS's collaborative stance as capture requires a definition that emphasizes the notion that the agency's relationship with oil producers made it impossible for MMS to do what ought to have been the public preference. This seems to fall outside the common definition of what capture is.¹⁶⁶

Possibly a more important implication of the shift in political and public preferences beginning in the early to mid-1990s is that it renders determining how it came to be and even whether MMS's behavior reflected capture less consequential. Facing a unified push for development and a broad array of mechanisms for politicians to influence oil and gas policy priorities, it is unclear how the actions of a regulatory agency not simultaneously asked to manage offshore development would have been substantially different. Even if such a regulator would have been able to resist – to some degree – the strong predilections of its political overseers and the public for cheap energy, the debate would then have likely centered on whether it was a rogue agency that needed to be corralled.

More fundamentally, to conclude that MMS was captured because it emphasized production over environmental protection and regulation requires the simultaneous acknowledgement that it was – in all practicality – fulfilling its mandate and supporting the public interest by doing so. To choose a path that limited drilling and emphasized safety, MMS would have needed to do so in the face of opposing statutory, political, industry, and public pressure. From this perspective, it is perhaps not as surprising or alarming that some scientists at MMS felt that environmental risks were not being given enough consideration.¹⁶⁷ In fulfilling its mandate to offer

¹⁶⁴ Huntington, "The Marasmus of the ICC"; Bernstein, *Regulating Business*.

¹⁶⁵ Stigler, "The Theory of Economic Regulation"; Peltzman, "Toward a More General Theory of Regulation."

¹⁶⁶ Levine and Forrence, "Regulatory Capture, Public Interest, and the Public Agenda."

¹⁶⁷ Eilperin, "U.S. Oil Drilling Regulator Ignored Experts' Red Flags;" Urbina, "U.S. Said to Allow Drilling without Needed Permits."

5.8 million previously prohibited acres of Gulf property for lease in one year as a result of the Gulf of Mexico Energy Security Act in 2006, it might be more surprising if environmental risks were actually being adequately considered. Thus it is not evident – even if one was able to reconstruct the world in such a way as to ensure MMS was not captured – that the agency would have made different choices. From this perspective, the question of whether, how, and to what extent MMS was captured through its organizational design or its collaborative stance with industry is relegated to a second-order issue.

EVALUATING THE REDESIGN OF FEDERAL OIL AND GAS FUNCTIONS

Recognizing the significance of political and public preferences in defining MMS's priorities does not imply that the activities outlined in the 2008 and 2010 OIG reports are in any way consistent with the notion of the public interest or inconsistent with most views of what a captured agency looks like. What it does suggest is that the blind application of the term *capture* to MMS may be too encompassing. Labeling an agency as captured implicitly assumes that the problems are pervasive enough that delineating between subpopulations within the agency is just not necessary. However, as this analysis of the organizational history of MMS has shown, distinguishing between various groups within the agency is as important in this context as it can be more generally.¹⁶⁸

A closer evaluation of the evidence also appears to support the view that such captured behavior was less prevalent than a more cursory examination may suggest. In fact, the OIG report detailing the unethical behavior uncovered through its investigation of the Lakewood RIK Program suggested as much. As summarized by OIG, "Our investigation revealed that many RIK employees simply felt that federal government ethics standards and DOI policies were not applicable to them because of their 'unique' role in MMS."¹⁶⁹ In addition, the investigation revealed that these employees "took steps to keep their social contacts with industry representatives a closely held secret." When the investigators questioned one of the group members regarding why RIK employees attempted to keep their social activities from other MMS personnel, he responded, "They might have, you know, contacted the [Inspector General]."¹⁷⁰ These quotes indicate

¹⁶⁸ Graham T. Allison and Philip D. Zelikow, *Essence of Decision: Explaining the Cuban Missile Crisis*, 2nd ed. (New York: Addison Wesley Longman, 1999).

¹⁶⁹ Office of the Inspector General, "Investigative Report: MMS Oil Marketing Group," 5.

¹⁷⁰ *Ibid.*, 6.

that the unethical behavior displayed by RIK employees was not necessarily reflective of MMS personnel more generally.

However, such evidence is not just confined to the RIK investigation. Although it did take issue with an MMS policy that required inspectors to contact some regulated entities prior to visiting their facilities, a subsequent September 2010 OIG report – investigating allegations that employees in the Lake Jackson, Texas, district office misused helicopters to attend lunches with industry personnel, rescinded notices of safety violations, and falsified inspection reports – did not reveal evidence of misconduct among inspection personnel.¹⁷¹ Furthermore, a broader investigation commissioned by Secretary Salazar, while providing an extensive set of recommendations to improve regulatory operations, noted that the team performing the review “found the BOEMRE employees it interviewed to be a dedicated, enthusiastic cadre of professionals who want nothing more than to do their jobs effectively and efficiently.”¹⁷² Perhaps this is best summarized by the inspector general in his memo attached to the RIK investigation: “As you know, I have gone on the record to say that I believe that 99.9 percent of DOI employees are hard-working, ethical and well-intentioned. Unfortunately, from the cases highlighted here, the conduct of a few has cast a shadow on an entire bureau.”¹⁷³ Given this evidence, it does not seem overly optimistic to suggest that the unethical behavior observed at MMS was just not symptomatic of the agency as a whole.

However, regardless of whether one believes that the evidence uncovered through the OIG investigations and interviews of some agency scientists is enough to demonstrate that MMS was broadly captured, it does not necessarily follow, of course, that the theories regarding how it became so are necessarily accurate. Furthermore, it also does not necessarily follow that capture can explain a significant portion of what might have led to the *Deepwater Horizon* disaster or that other factors are not more important. By incorporating an appreciation of the details surrounding MMS’s organizational structure and political history, this chapter has attempted to provide evidence on each of these observations. First, an examination of MMS’s organizational division between Revenue Management and Offshore Energy, as well as historical patterns of congressional oversight

¹⁷¹ M.L. Kendall, “Report of Investigation for Alleged MMS Employee Misconduct – Lake Jackson District, PI-PI-10-0564-I” (Memorandum, U.S. Department of the Interior, 2010).

¹⁷² M.L. Kendall, “Evaluation – Outer Continental Shelf (OCS) Oil and Gas operations, Report No. CR-EV-MMS-0015-2010” (Memorandum, U.S. Department of the Interior, 2010), 2.

¹⁷³ Devaney, “OIG Investigations of MMS Employees,” 3.

and appropriations decision making related to the groups, has revealed inconsistencies with the hypothesis that MMS's revenue function led to the capture of its regulatory charge. Second, a review of important political developments as well as the political and public push for oil and gas development has underscored the important role of such influences on regulatory decision making at MMS. Third, these same patterns of congressional oversight as well as executive preferences and public opinion reveal that the question of MMS's capture might be less important in explaining the *Deepwater Horizon* tragedy than is widely believed. At a minimum, a review of the political and operational history of MMS has suggested that it is not unreasonable to think that there are other significant factors that might have been driving behavior at MMS as well.

Even so, these insights represent more than just an academic exercise, as the prevailing belief of MMS's capture as well as conclusions regarding the origin of the agency's compromised relationship with industry, in large part, drove the efforts to improve how the government manages offshore oil and gas operations. As a result, in addition to the diagnosis of capture itself, examining how an agency became captured is important because the perceived mechanisms can define, as they did in the case of MMS, how the subsequent reforms are structured. Yet, even to the extent that these conditions do help explain the existence of a partially compromised regulator, a fixation on remedying these facilitating circumstances can obscure the reasons why these conditions were imposed in the first place. Particularly when capture is not pervasive at the agency or is of a weak form – discussed by Daniel Carpenter and David Moss in the Introduction to this volume as capture that still promotes the public interest to a reasonable degree – the solution can impose offsetting costs that are as large or even larger.

Reorganizations, particularly those on the scale of what was implemented at Interior, cost money, take time, and impose dislocations on employees. In speculating on how the restructuring is likely to affect ongoing governmental oil and gas operations, it is instructive to recall the impetus for the creation of MMS in the first place. Instead of citing conflicts of interest as a reason to separate minerals management functions, GAO, as well as the Linowes Commission and Congress, pressed for the establishment of one agency to oversee “the entire mineral management area” given that the existing “division of function often caused problems of neglect, duplication, and turf wars.”¹⁷⁴ Not only did having BLM conduct preleasing functions and sales while locating lease management at USGS create jurisdictional

¹⁷⁴ Commission on Fiscal Accountability of the Nation's Energy Resources, *Fiscal Accountability*; Committee on Appropriations, “Department of the Interior and Related Agencies Appropriation Bill, 1983”; Socolar, “Statement of Milton J. Socolar.”

problems, it was also cited as a cause for Interior's inability to prevent oil companies from fraudulently removing oil without reporting it as production. As described by the Director of GAO's Energy and Minerals Division at a 1981 hearing before the House Committee on Interior and Insular Affairs, "The fragmentation of authority and accountability for implementing the mineral leasing laws contributes to the weakness of Federal minerals management. Such a weakening factor is central to any consideration of how to improve the revenue potential of Federal resources."¹⁷⁵ Thus, at the time, the fundamental question was not why the functions were combined, but rather why onshore development, leasing, and regulation were separately housed at BLM instead of MMS.¹⁷⁶

Analogously, citing coordination problems between BLM, BIA, and MMS for onshore revenue collection as well as between MMS's Offshore Energy and Revenue Management groups for offshore collection, the December 2007 Subcommittee on Royalty Management report stressed the need for more – not less – intra- and inter bureau synchronization by creating cross organizational teams and syncing computer systems.¹⁷⁷ Moreover, given the extensive overlap associated with the functions that formed Offshore Energy, even Secretary Salazar's July 2010 implementation report recognized the inherent limitations in trying to create separate offshore planning and regulatory organizations. After the prolonged restructuring process was completed, the plan emphasized the need for the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement to maintain ongoing "close program coordination" to operate effectively, as "functions and process are tightly interconnected" between these components.¹⁷⁸ Thus, to the extent that the separation of offshore planning from oversight could, in theory, even partially insulate regulation from the political and public pressure to promote oil and gas production, the offsetting need to coordinate the associated functions makes that possibility both less feasible and less desirable.

Given that a closer investigation of the evidence has raised doubts about the role that capture played in the Gulf oil spill, the mechanisms

¹⁷⁵ J. Dexter Peach, "Statement of J. Dexter Peach, Director, Energy and Minerals Division, before the House Committee on Interior and Insular Affairs on Department of the Interior organizational Effectiveness for Management of Federal Energy and Mineral Resources" (U.S. House of Representatives, 1981), 6.

¹⁷⁶ General Accounting Office, "Interior's Minerals Management Programs Need Consolidation to Improve Accountability and Control" (GAO/EMD-82-104, General Accounting Office, 1982); Durant, *The Administrative Presidency Revisited*.

¹⁷⁷ Subcommittee on Royalty Management, "Report to the Royalty Policy Committee."

¹⁷⁸ Department of the Interior, "Reorganization of the Minerals Management Service," 6.

commonly cited that provided the impetus for capture, and even the extent to which MMS was captured, the reforms designed to address those perceived issues could be viewed with some skepticism. However, when the reforms return governmental oil and gas management to a structure that history has revealed to have substantial coordination costs and that demonstrated many similar outward signs of failure, the remedies risk causing more harm than good. To the degree that community ties between industry and Offshore Energy inspectors as well as MMS's collaborative style facilitated a common set of assumptions and prejudices surrounding oil and gas operations, there are few indications that separating offshore oversight from leasing and development decisions can, or was even intended to, deal with these deeper issues. As former MMS Director Birnbaum testified, there is "no silver bullet to eliminate the close connections between offshore inspectors and the employees of the industry they regulate. They will still live in the same communities."¹⁷⁹

In his January 2011 State of the Union address, President Obama highlighted the redundancy associated with having twelve bureaus participate in managing exports, at least five for housing policy, and two for salmon conservation. Citing the need to get "rid of waste," the president promised a plan to "merge, consolidate, and reorganize" government to increase efficiency.¹⁸⁰ From this perspective, the breakup of MMS – based on uncertain evidence of how its capture by industry came to be or even the extent to which its capture led to failure – that may resurrect old problems of "neglect, duplication, and turf wars" and complicate implementation of energy policy could represent a step in the wrong direction.¹⁸¹

¹⁷⁹ Birnbaum, "Transcript of Testimony."

¹⁸⁰ Barack Obama, "Remarks by the President in State of the Union address" (The White House, Office of the Press Secretary, 2011).

¹⁸¹ Committee on Appropriations, "Department of the Interior and Related Agencies Appropriation Bill, 1983," 40.